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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *et al.*
Petitioners,

v.

TRANSPORT WORKERS' UNION OF PHILADELPHIA, LOCAL 234, *et al.*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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113 pp

QUESTIONS PRESENTED

(1) Whether an urban mass transportation authority's addition of random drug and alcohol testing to an existing unchallenged policy of fitness for duty drug and alcohol testing of safety-sensitive personnel constitutes a major dispute under the Railway Labor Act.

(2) Whether an urban mass transportation authority's inclusion of a drug screen in routine return to work physical examinations of safety-sensitive personnel conducted in support of its fitness for duty standard violates the Fourth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

The proceedings below involved four actions which were not consolidated into one action. The respective parties and docket numbers in the court below are as follows:

Petitioners include:

1. Southeastern Pennsylvania Transportation Authority in all of the cases which include Nos. 88-1160, 88-1161, 88-1162, 88-1163, 88-1206, 88-1207 and 88-1208; and

2. Louis F. Gould, Jr., Esquire, Individually and in his official capacity as Chairman of the Board of SEPTA; Robert J. Thompson, Individually and in his official capacity as Vice Chairman of the Board of SEPTA; Brian W. Clymer; Judith E. Harris, Esquire; Mary C. Harris, Thomas M. Hayward, C.P.A.; Frank W. Jenkins, Esquire; Richard E. Kutz, Esquire; David W. Marston, Esquire; James C. McHugh and Franklin C. Wood, Individually and in their official capacities as Members of the Board of SEPTA in all of the cases which include Nos. 88-1160, 88-1161, 88-1162, 88-1163, 88-1206, 88-1207 and 88-1208.

Respondents include:

1. Transport Workers' Union of Philadelphia, Local 234 in Nos. 88-1160 and 88-1206;

2. Transport Workers' Union of America, Local 2013 in No. 88-1161;

3. Brotherhood of Locomotive Engineers, Division 71 and Brotherhood of Locomotive Engineers and Thomas C. Brennan in Nos. 88-1162 and 88-1207; and

4. United Transportation Union, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Brotherhood of Maintenance of Way Employees, Brotherhood of Railroad Signalmen in Nos. 88-1163 and 88-1208.

Petitioner Southeastern Pennsylvania Transportation Authority has no parent corporation(s), non-wholly-owned subsidiaries or affiliates.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Southeastern Pennsylvania Transportation Authority, et al., (SEPTA) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on December 28, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 863 F.2d 1110 (3d Cir. 1988) and is reproduced in the Appendix hereto at A-1 to A-30.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 678 F.Supp. 543 (E.D.Pa. 1988) and is reproduced in the Appendix at A-33 to A-53.

JURISDICTION

The decision of the Court of Appeals was entered on December 28, 1988. On January 19, 1989, the Court of Appeals stayed the issuance of its mandate until February 17, 1989. A-31. On February 16, 1989, the Court of Appeals extended the stay of issuance of the mandate until March 9, 1989. A-32. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 2, 3, 5 and 6 of the Railway Labor Act, 45 U.S.C. 152, 153, 155 and 156 are set forth in pertinent part in the Appendix at A-58 to A-75.

STATEMENT OF THE CASE

The Court has granted a Writ of Certiorari to the United States Court of Appeals for the Third Circuit and on February 28, 1989 heard argument in the matter of *Consolidated Rail Corporation v. Railway Labor Executives' Association,* 845 F.2d 1187 (3d Cir. 1988), *cert. granted,* 109 S.Ct. 52 (1988). Conrail is one of the nation's largest freight rail carriers. The question posed in that proceeding is whether Conrail's inclusion of a drug test in the urinalysis component of its fitness for duty medical examinations constituted a "major dispute" under the Railway Labor Act, 45 U.S.C. §151 *et seq.* (RLA).

In the present case, one of the nation's largest urban mass transportation systems, Southeastern Pennsylvania Transportation Authority (SEPTA), imperiled by an extraordinary, proven pattern of drug and alcohol usage, seeks a Writ of Certiorari on two closely related questions concerning fitness for duty drug and alcohol testing. The case arises out of SEPTA's efforts to apply a long standing and well publicized fitness for duty standard to personnel in operator and other safety-sensitive

positions,[1] and in support thereof to conduct random[2] and return to work drug and alcohol testing of such personnel on an administrative basis, all as part of a balanced, tripartite program of education, rehabilitation, and testing.[3]

For the same reasons that led the Court to grant the Writ of Certiorari in *Conrail*, the court should grant a Writ in the present case. However, this case presents a situation of even greater significance and risk to the public than *Conrail.* SEPTA's employees carry and are entrusted with hundreds of thousands of human lives each year, not inanimate objects of freight. The public's interest in safe mass transportation, as well as in a determination of what responsible management can do in the context of the Railway Labor Act, is of vital importance. The issues involved in this petition should not be left unresolved by the Court.

A. The SEPTA Transportation System.

SEPTA, a public agency, organized under 66 Pa. Stat. Ann. §2001 *et seq.* (repealed) and 55 Pa. Con. Stat. Ann. §600.11 *et seq.* owns and operates mass transportation facilities consisting of subways, buses, trolleys, and high speed commuter rail lines in Bucks, Chester, Delaware, Montgomery and Philadelphia counties in

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1. *e.g.* engineer, bus person, subway/elevated train person, signal maintainer and various inspectors.

2. "Random" in the context of this case means a computer generated, scientifically random selection of employees to be tested, which selection has been devised by a nationally recognized statistical consultant to exclude any arbitrary, capricious or discriminatory basis for selection of employees to be tested. A-24.

3. The testing component is not administered for disciplinary purposes but is rather utilized to prevent personnel in the foregoing safety-sensitive positions from endangering SEPTA's passengers and operators, routing them instead to rehabilitation programs.

Pennsylvania, New Castle County, Delaware and Mercer County, New Jersey.[4] A-35 to A-36.

Operation of SEPTA's high speed vehicles requires the use of complex skills. Congested arteries, crowded vehicles, difficult weather conditions and unruly passengers are common. As acknowledged by the District Court, "[v]ehicle operators must be attentive to their work. Subway and train signal systems are complex and demanding. Braking requires vigilance and sound judgment", and "[a] vehicle operator must have a clear mind and the ability to react quickly and efficiently." A-36. Thus, even if one could operate a train down an open track, the question remains whether, at a crucial instant, the operator could discern a rapidly changing signal, determine the necessary response, and execute that response rapidly enough to avoid catastrophe. One of respondents' expert witnesses acknowledged that drug users not "obviously impaired in performing routine

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4. The Regional Rail Division (RRD) serves all the aforesaid counties with a network of 13 commuter rail lines providing approximately 78,000 passenger trips per day. The RRD employees are represented by various railway brotherhoods including Brotherhood of Locomotive Engineers (BLE), United Transportation Union (UTU), Brotherhood of Railway, Airline and Steamship Clerks (BRAC), Brotherhood of Maintenance of Way Employees (BMWE) and Brotherhood of Railroad Signalmen (BRS). The relationships of those unions and SEPTA are governed by the Railway Labor Act, 45 U.S.C. §151 *et seq.*

The City Transit Division (CTD) provides approximately 789,000 passenger trips per day in a network of subway, bus, trolley and trackless trolley car routes mostly within the City of Philadelphia. The CTD employees are represented primarily by Transport Workers Union of Philadelphia, Local 234 (TWU). The relationship of TWU and SEPTA is governed by the Pennsylvania Public Employee Relations Act, 43 Pa. Stat. Ann. §1101.101 *et seq.* (PERA)

There is also a Suburban Transit Division (STD) serving the western and northern suburbs of Philadelphia with a variety of inter-urban trolley, streetcar and bus routes. The STD employees are represented primarily by the UTU. The relationship between UTU and SEPTA in the STD is also governed by PERA.

work tasks can display a lack of flexibility and inability to respond to sudden changes or emergency situations". A-20.

The problem is exacerbated by the fact that bus and train operators conduct their activities across a wide geographic area in a multitude of separate vehicles. Typically, they are alone or accompanied only by a person who may be located in a separate compartment and therefore do not operate under continuous supervisory observation.

B. Drug And Alcohol Use By SEPTA Personnel And The Authority's Response.

Drug and alcohol use by SEPTA's operating employees has presented an increasingly significant safety problem. A-19. In six major accidents occurring in 1986 and 1987, collectively involving at least 89 injuries, the operators of SEPTA vehicles at fault tested positive for alcohol or drug metabolites. Of 262 employees tested "for cause" between January 1985 and July 1987, 82 employees or 31% tested positive for drug metabolites or alcohol. Twelve percent of the new hires given drug tests within the same period produced positive results. A-20. Moreover, almost one out of every ten employees returning from extended absences (not including persons reinstated following a disciplinary event) tested positive. Of those employees who were tested prior to returning after being reinstated following discipline, the number of positives increased to 29%.

Following a series of drug-related accidents, on January 16, 1987, SEPTA announced the addition of random drug and alcohol testing to its existing fitness for duty and suspicion based drug and alcohol testing. This policy was set forth in Order No. 87-1 which states in pertinent part:

> In view of the critical nature of the Authority's operation and in furtherance of the Public Policy

concerning alcohol/drug abuse in the workplace; operating employees will be subject to urine and/or blood screening tests to determine if they are in compliance with the Authority's rules governing alcohol and/or drugs.

Screening will be without advance notice and will be accomplished in accordance with accepted practices.

In addition, on February 3, 1987, SEPTA issued Order No. 87-2 which amended its return to work medical examination procedure to include drug and alcohol screening in the case of absence due to physical problems, rehabilitation for substance abuse, disciplinary suspension or other absence from duty in excess of 30 days. A full set of regulations setting forth the testing program issued soon thereafter.

Respondents immediately sought an injunction against the random testing claiming it violated the Fourth Amendment and that it raised a major dispute under the RLA. A lengthy hearing followed in February 1987.[5] Though recognizing merit in SEPTA's efforts, on February 19, 1987, the District Court preliminarily enjoined the new testing and directed the parties to discuss a revised program.

C. The Integrated Program.

Following an extended dialogue over the spring and summer of 1987 between SEPTA and the respondents, and various experts engaged by the parties, SEPTA proposed a substantially modified program entitled "Integrated Program of Education, Assistance and Testing

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5. Order No. 87-2 concerning return to work testing was issued during the course of the hearing. Its constitutionality also was challenged by Respondents by means of an amended complaint.

for Intoxicants and Controlled Substances." (the Integrated Program).

In addition to the random and return to work testing, the Integrated Program contained substantial educational and rehabilitative provisions. The Integrated Program is based on the fitness for duty standard which requires that while on duty or subject to duty, operators and others in safety-sensitive positions must be drug and alcohol free. This means that at the time of testing, during the employee's work day and on Authority property, he or she is free of alcohol or drugs or their metabolites in an amount sufficient to be identified as positive under the announced standards.[6]

In accordance with Order No. 87-1, the Integrated Program provides for random testing of urine and breath. Such testing may not commence sooner than ninety days after notice that the Integrated Program is going into effect is given to the employees, not sooner than ninety days after the Integrated Program's educational component is in place and not sooner than thirty days after the Integrated Program's employee assistance component is in place. The employee assistance component utilizes an outside provider selected after consultation with the respondent unions and offers substance abuse treatment, rehabilitation and after care tailored to the individual employee. Employees may also refer themselves prior to any testing and voluntarily enter the employee assistance component.

In addition to the random testing, the Integrated Program provides, in accordance with Order No. 87-2, that employees will be tested when they are about to return to work from an absence of over thirty (30) days. This testing would be done as part of the scheduled

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6. The standards were established with advice from nationally recognized consultants who have worked with the International Brotherhood of Teamsters, Major League Baseball and the United States Navy.

medical examination routinely given to the employee upon his or her return to work.

Stringent safeguards exist for confidentiality of test results. The testing component, which requires confirmation by gas chromatography/mass spectrometry, is governed by strict specifications, including rigorous chain of custody provisions. Moreover, in the event of a positive random test result, which is itself subject to a careful review process, the employee is given an opportunity for rehabilitation under the employee assistance component.[7] A-9 to A-10.

D. The Historical Development Of SEPTA's Fitness For Duty And Suspicion Based Testing As It Relates To The Regional Rail Division.

On January 1, 1983, SEPTA succeeded Conrail as the operator of the commuter railway system in the Philadelphia metropolitan area, which SEPTA reconstituted into what is now known as the Regional Rail Division. As a result, SEPTA has collective bargaining agreements governed by the Railway Labor Act with respondents UTU, BRAC, BLE, BMWE and BRS. Each of the rail labor agreements contains a provision for the arbitration of grievances.

Each of the rail labor agreements also specifically contains a section providing that:

> The safe, efficient and economical operation of SEPTA is a major concern to the public, SEPTA, the employee and the Union.

and that all parties to the agreement:

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7. Only an employee who refuses to enter or cannot successfully complete rehabilitation, is subject to discipline. This approach was explicitly endorsed by the Director of the Rutgers University Center of Alcohol Studies, an expert witness in this proceeding.

> are charged with the responsibility of positively and cooperatively advising management concerning means of . . . improving safety.

In addition, each of the rail labor agreements specifically contains a management functions clause which states that:

> All management functions and responsibilities which SEPTA has not expressly modified or restricted by a specific provision of this Agreement are retained and vested exclusively in SEPTA.

The BLE and UTU contracts specifically provide for periodic medical examinations.

SEPTA and its predecessor, Conrail, promulgated a series of rules and statements of policy relating to the preservation of fitness for duty, culminating in Order Nos. 87-1 and 87-2 and the Integrated Program. The rail labor respondents never previously contended that any such change in the rules regarding drugs and alcohol raised a major dispute under the RLA, as they now contend for the first time with respect to Order No. 87-1 and the Integrated Program.

Thus, for many years, SEPTA's predecessor, Conrail, had in place Rule G which provided that:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty is prohibited.
>
> Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties.

Following the effective date of SEPTA's first agreement with BLE on July 1, 1983, it repromulgated Rule G as Rule I which added a procedure for blood and/or urine testing to what had been under Rule G a fitness for duty standard enforced solely by supervisory observation. The

Brotherhoods voiced no contention that the promulgation of Rule I presented a major dispute.

Thereafter, in 1985, SEPTA promulgated Order No. 85-1 which provided in pertinent part that:

> Because of the unpredictable residual effects of certain intoxicants and/or controlled substances *the presence of intoxicants or controlled substances* in employees . . . is strictly prohibited and is a dischargeable offense . . . Any employee suspected of being in violation of this Order may be required to take a blood/urinalysis or other toxicological test(s).

(Emphasis added). The Brotherhoods voiced no contention that the promulgation of Order No. 85-1 presented a major dispute.

On July 10, 1986, SEPTA issued District Notice No. 3-25 providing that:

> Effective immediately, any signal violation will result in body fluid testing and discipline up to and including the discharge of negligent personnel.

The Brotherhoods raised no objection with respect to that rule either. Further, members of certain of the railroad crafts have for some time been tested for drugs and alcohol during routine periodic physical examinations, without objection by the respondents.

E. Major v. Minor Disputes Under The Railway Labor Act.

This case involves an improper characterization of a railway labor dispute by the Third Circuit, a characterization which is not only incorrect under this Court's decisions and in conflict with relevant circuit court decisions, but which has serious consequences both for mass transportation and for public policy. In *Elgin, Joliet & Eastern Railway Co. v. Burnley,* 325 U.S. 711 (1945), *aff'd on rehearing,* 327 U.S. 661 (1946), this Court held

that a "minor" dispute:

> . . . contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The *dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation* . . . the claim is to rights accrued, not merely to have new ones created for the future.

325 U.S. at 723 (emphasis added). The *Elgin* court classified as "major":

> disputes over the formation of collective agreements or efforts to secure them. *They arise where there is no such agreement or where it is sought to change the terms of one,* and therefore the issue is not whether an existing agreement controls the controversy.

325 U.S. at 723 (emphasis added). The question thus is whether a matter implicates a "change . . . in the working conditions . . . as embodied in agreements. 45 U.S.C. §152, Seventh. A-60. If so, the matter is subject to Section 6 of the RLA, 45 U.S.C. §156, and is a so-called "major dispute", A-74 to A-75; if not, the matter is subject to Section 3, 45 U.S.C. §153, First (i) and is a so-called "minor dispute". A-65.

That determination turns on an assessment by the court (in cases where the carrier and union clash over that preliminary question) of whether the position of the moving party can "arguably" be justified by the existing agreement. *United Transportation Union v. Penn Central Transportation Co.,* 505 F.2d 542, 544 (3d Cir. 1974). If so, then no "change" in working conditions "embodied in agreements" is involved, and the matter goes to an arbitration board under Section 3, 45 U.S.C. §153.[8]

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8 Of course, the arbitrator may ultimately find that the matter is not contractually justified in which case a "change" is involved, and the moving party must either follow Section 6 or recede.

It is not necessary that the terms of a collective bargaining agreement be set forth in a written document; they can be inferred from habit and custom. *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 153-154 (1969); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087, 1091-1092 (9th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3017 (U.S. April 1, 1988) (No. 87-1631). Past practice, accepted or acquiesced in by a party, also becomes part of the agreement. *Maine Central R.R. v. United Transportation Union*, 787 F.2d 780, 783 (1st Cir.), *cert. denied*, 479 U.S. 848 (1986). So long as the carrier's interpretation of the agreement is not "frivolous" or "obviously insubstantial," the dispute must be deemed minor.[9]

That preliminary judicial assessment determines whether the dispute is to be resolved peacefully or instead by resort to economic self-help. Under the RLA,

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9. See, e.g. *International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794, 796 (5th Cir. 1988) ("arguably justified"); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087, 1111 (9th Cir. 1988) ("arguably justified"), *petition for cert. filed*, 57 U.S.L.W. 3017 (U.S. April 1, 1988) (No. 87-1631); *National Ry. Labor Conference v. International Ass'n of Machinists & Aerospace Workers*, 830 F.2d 741, 746 (7th Cir. 1987) (minor unless claim is "frivolous" or "obviously insubstantial"); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986) ("reasonably susceptible" to asserted interpretation); *Brotherhood Ry. Carmen v. Norfolk & Western Ry.*, 745 F.2d 370, 375 (6th Cir. 1984) ("arguably justified" or not "obviously insubstantial"); *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 948 (2d Cir. 1983) (not "obviously insubstantial"), *aff'd in part and rev'd in part on other grounds, sub nom., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *International Brotherhood of Electrical Workers v. Washington Terminal Co.*, 473 F.2d 1156, 1173 (D.C. Cir. 1972) ("reasonably susceptible" to carrier's contention), *cert. denied*, 411 U.S. 906 (1973).

a question constituting a minor dispute is ultimately subject to resolution by compulsory arbitration, 45 U.S.C. §152, Sixth and §153; on the other hand, a matter deemed to constitute a major dispute, although subject to a long panoply of procedures involving negotiation, conciliation, fact finding and mediation, *Brotherhood of R.R. Trainmen v. Jacksonville Co.*, 394 U.S. 369, 378-9, *reh'g denied*, 394 U.S. 1024 (1969), is ultimately resolvable, in the absence of mutual agreement either on the issue itself or on an *ad hoc* arbitration of the issue,[10] only by resort to the strike weapon. *Railway Labor Executives Association v. Norfolk & Western Railway Co.*, 833 F.2d 700, 704 (7th Cir. 1987); *International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794 (5th Cir. 1988).

The national labor policy unambiguously favors arbitration as a means of resolving labor management disputes. In *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), this Court expressly held that unless it can be said with positive assurance that a grievance arising between an employer and a labor organization is not arbitrable, a presumption of arbitrability applies.

The Railway Labor Act is no different. The same presumption exists that arbitration is the favored mechanism, and therefore, that most disputes should be characterized as minor and resolved within the arbitration mechanisms of the existing collective bargaining agreements. See *Northwest Airlines, Inc. v. Air Line Pilots Ass'n., Intern.*, 808 F.2d 76 (D.C. Cir. 1987) (airline safety dispute is arbitrable). Indeed,

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10. Such an arbitration, unlike arbitration of a minor dispute, is *not* mandatory. Section 5, First, 45 U.S.C. §155, First. A-73 to A-74. The dispute may also be resolved by Congress. *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 107 S.Ct. 1841, 1846 (1987).

> [t]he primary objectives of the RLA are to promote stability in labor relations in the railroad industry and prevent strikes. *Because a major dispute can escalate into a strike, if there is any doubt as to whether a dispute is major or minor a court will construe the dispute to be minor.*

Railway Labor Executives' Association v. Norfolk & Western Railway Co., 833 F.2d 700, 704-705 (7th Cir. 1987)(citations omitted)(emphasis added). Thus, as the Seventh Circuit explained earlier in *Brotherhood of Locomotive Engineers v. Atchinson, Topeka & Sante Fe Railway Co.*, 768 F.2d 914, 920 (7th Cir. 1985):

> Since the machinery for resolving major disputes is conciliatory rather than binding, a major dispute can escalate into a strike, which in the transportation industries – producers of a nonstorable service – can be a calamity. So it is no surprise that, when in doubt, the courts construe disputes as minor.

F. The Proceedings Below Following Promulgation Of The Integrated Program.

After a second round of hearings in September 1987, the District Court held that the Fourth Amendment did not preclude the random testing but did foreclose the return to work testing. Accordingly, the District Court vacated the injunction against random testing as it applied to the City Transit Division and Suburban Transit Division, but continued the injunction against return to work testing. A-52 to A-53. The District Court also continued the injunction against the imposition of random testing in the Regional Rail Division because it deemed such testing to be a major dispute requiring the exhaustion of Section 6 procedures under the Railway Labor Act. SEPTA filed a motion to alter or amend the judgment and to amend the findings of fact regarding the return to work holding.

The District Court denied that motion. A-56 to A-57. Both sides then appealed.

The Third Circuit, viewing "with amazement" the respondent rail unions' assertion that "[th]is case involves an overreaction to an exaggerated hysteria concerning the use of drugs and alcohol in our society," found that "[t]he enormity of the problem facing this country because of drug use is sufficiently well established to justify judicial notice." A-19. It concluded that there was adequate support for the District Court's findings that "drug use by SEPTA's operating employees present[ed] a significant safety problem and that the Authority's prior suspicion-based testing program proved insufficient 'to satisfy the needs of public safety' ". A-19.

The Court of Appeals affirmed the District Court's decision in its entirety. In so doing, the Court of Appeals created a paradoxical situation in which SEPTA could, with the District Court's imprimatur, commence random drug and alcohol testing in the City Transit Division and the Suburban Transit Division but could not do so in the Regional Rail Division. It created the additional anomaly in the City and Suburban Transit Divisions that random testing was to be permissible under the Fourth Amendment but return to work testing (with notice and as part of a scheduled medical examination) was not.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE THIRD CIRCUIT THAT THE ADDITION OF RANDOM TESTING TO AN EXISTING PROGRAM OF FITNESS FOR DUTY DRUG AND ALCOHOL TESTING CONSTITUTES A "MAJOR DISPUTE" CONFLICTS IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW.

A. The Decision Conflicts In Principle With Decisions Of The Seventh And Eighth Circuits.

The Third Circuit's decision in this matter conflicts in principle in two respects with the Seventh Circuit's decision in *Railway Labor Executives' Association v. Norfolk & Western Railway Co.*, 833 F.2d 700 (7th Cir. 1987) and with the Eighth Circuit's decision in *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986).

The Third Circuit misconceived SEPTA's Integrated Program as a modification of its disciplinary rules rather than a refinement of the fitness for duty standard. On this mistaken premise, the Court held that the random testing constituted such a significant departure from the prior reasonable suspicion based testing engaged in by SEPTA as to present a major dispute. Because SEPTA's random testing is to determine fitness for duty (and not to uncover violations of rules), the Third Circuit's decision conflicted in principle with those of the Seventh and Eighth Circuits which held that the addition of a drug screen to a medical examination *intended to determine fitness for duty* raises only a minor dispute.

In *Norfolk & Western Railway,* the carrier had a long standing history of routine periodic medical examinations. The railroad added to those examinations a drug screen urinalysis as "an additional method of insuring that employees are fit for their jobs." 833 F.2d

at 706. The consequence of a positive result was that the employee was given forty-five days within which to demonstrate that his or her system was drug free by providing a clean urine sample, or to participate in the carrier's treatment program. If he or she failed to do so, dismissal would follow. 833 F.2d at 708. Similarly, under SEPTA's program, an employee who tests positive may choose to enter into a rehabilitation program and can be dismissed only, ultimately, if he fails rehabilitation or refuses to enter into rehabilitation.

In *Burlington Northern,* the court stated that:

> it should come as no surprise to the parties that the components of the work fitness medical examination will change with the times. Because BN and the union are involved in a dispute over the scope of BN's actions designed "to ensure that all employees are fit for duty" — actions which are arguably justified — this dispute should be submitted to the National Railroad Adjustment Board.

802 F.2d at 1024. Inasmuch as SEPTA proposes to test on a random basis, its fitness for duty drug testing is in fact less obtrusive than that of the Norfolk & Western or Burlington Northern and should have been similarly classified as a minor dispute.[11] The Third Circuit's

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11. It is true that both the Seventh and Eighth Circuits in the foregoing decisions inferentially expressed skepticism as to whether the implementation of random testing would present only a minor dispute. But, in both instances, the Courts discussed random testing in the context of the enforcement of Rule G, the disciplinary rule that prescribes termination in the event of a substance abuse violation. *Norfolk & Western,* 833 F.2d at 707 fn. 6 and *Burlington Northern,* 802 F.2d at 1022-1023. In SEPTA's case, just as in that of the Norfolk & Western and Burlington Northern, a violation of Rule I (the successor to Rule G) would call for termination. But because it is fitness for duty testing and not cause testing, the Integrated Program does not require discipline, even in the face of a positive test result, unless an employee refuses rehabilitation. Accordingly, the doubts expressed by the Seventh and Eighth

decision to the contrary therefore conflicts in principle with both *Norfolk & Western* and *Burlington Northern*.

The Third Circuit's opinion also conflicts with *Norfolk & Western,* in terms of the weight to be accorded the prior history of union acquiescence in SEPTA's medical fitness for duty testing. The Seventh Circuit found that the Norfolk & Western conducted routine medical examinations to determine fitness for work for at least 20 years and that:

> The unions have never objected to N&W's requirement that all employees routinely undergo these physical examinations and that all employees returning from furloughs or other extended leaves of absence pass a medical examination before they return to work. Further, the unions have not previously objected to any specific test conducted as part of these examinations.

833 F.2d at 705. These findings formed an essential basis for the Seventh Circuit's conclusion that the addition of the drug screen to the routine examinations presented only a minor dispute.

In the present case, however, notwithstanding that the respondents had never previously objected to any of the several stages of evolution in SEPTA's testing, the Third Circuit rejected SEPTA's argument that this history disabled the respondents from arguing that the random testing presents a major dispute. The Third Circuit reasoned that such a rule is inappropriate because it would "deter unions from acquiescing or compromising on the drug testing question at pain of being found to have agreed to a broader program." A-28. Thus, although it acknowledged that a drug testing program can arguably be justified not only by the written agreement but "from habit and custom," A-26, the Third

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NOTES *(Continued)*
Circuits with respect to random testing are not applicable in SEPTA's case.

Circuit nonetheless held that the respondents' past acquiescence in the development of the program was not to be considered in determining whether the random testing presented a major or minor dispute. This was not only illogical but directly in conflict with the Seventh Circuit's opinion in *Norfolk & Western*.[12]

B. How A Refinement Of Existing Drug And Alcohol Testing Is Categorized Under The RLA Has A Profound Impact On The Safety Of Urban Mass Transportation.

The enormity of the problem facing this country because of drug use, A-19, is compounded within the transportation industry by the fact that large vehicles are being operated at high speeds under complex conditions.[13] For that reason, among others, this Court has granted petitions for Writ of Certiorari in *Consolidated Rail Corporation v. Railway Labor Executives Association* and in *Railway Labor Executives'*

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12. The Third Circuit's observation that the District Court had correctly found that the unions had never before acquiesced in widespread testing or to any significant testing without individualized suspicion was incorrect. The railroad brotherhoods acknowledged in their brief to the Court of Appeals that there was already drug testing being done in conjunction with the periodic medical examinations required of members of the BLE and UTU.

13. As appropriately observed by Conrail in its petition for writ of certiorari filed on June 29, 1988:

> "The tragic consequences of drug and alcohol abuse in the transportation industry are vividly recited both in the Department of Transportation's Notice of Proposed Rulemaking, 53 Fed. Reg. 16,640 (1988) (to be codified at 49 C.F.R. pts. 217, 219) (proposed May 10, 1988), and in the petitions for writs of certiorari filed in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988) and *Brotherhood of Locomotive Engineers v. Burlington R.R.*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631)."

Association v. Burnley.

The dilemma posed to the freight rail carriers by drug and alcohol use in the foregoing cases is substantial and real, but it pales in comparison to the extraordinary danger to life and limb which such use presents to the hundreds of thousands of persons who ride SEPTA vehicles each day. Whatever the paramount public importance of deciding whether the Federal Railroad Administration Drug And Alcohol Testing regulations are constitutional as in *Burnley* or whether the addition of a drug and alcohol screen to a pre-existing periodic medical examination constitutes a major dispute as in *Conrail,* the question presented here eclipses those questions in public importance.

The Court of Appeals approved the District Court's findings that drug use by SEPTA's operating employees presents a significant safety problem and that SEPTA's prior suspicion-based testing program proved insufficient "to satisfy the needs of public safety and mass transit reliability". A-44.

Significantly, the Court of Appeals also found that:

> In light of the evidence connecting impairment with drug use, it was appropriate for SEPTA to design its program in an effort to detect drug users. It was not required to limit its detection efforts to those employees whose then—current impairment could be detected, particularly in light of the testimony by experts offered by both the Unions and SEPTA that current urine testing technologies do not permit the detection or measurement of current impairment.

A-21. The Court of Appeals further acknowledged that a carrier can not reliably detect use on a cause basis because impairment is frequently latent. A-20 to A-21. Yet, notwithstanding its concurrence in the concept of

use (rather than impairment) testing, the Court of Appeals predicated its conclusion that the random testing raised a major dispute upon its belief that "testing on the basis of reasonable suspicion of drug use bears an element of 'cause' *not* present in the case of random testing." A-27 to A-28. (emphasis added).

In so doing, the Court of Appeals exposed SEPTA and the riding public to the possibility that random testing, the need for which has already been demonstrated, might never come to pass in the Regional Railroad Division, unless SEPTA is prepared first to withstand a strike.

This is so because, if the implementation of random testing implicates a major dispute, the only way SEPTA can obtain the random testing in the Regional Rail Division, in the absence of agreement by the respondents, is to post new terms and conditions of employment, including the Integrated Program, after the RLA statutory "cooling off period", which itself follows a long period of negotiations and mediation, and thereby risk a strike.[14] Section 5, First, 45 U.S.C. 155, First. A-73 to A-74. Whether the imposition of random testing in the Regional Rail Division, is a major or a minor dispute, a question which affects all mass transit systems, is thus clearly a federal question of substantial importance which should be resolved by the Supreme Court.

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14. Finding the question to be a minor dispute subject to arbitration, of course, does not guarantee SEPTA would prevail in such arbitration. But it does guarantee that SEPTA's asserted right to conduct random testing in its Regional Rail Division would be resolved in the forum that the parties' have contractually selected and which the Railway Labor Act and national labor policy favor. Moreover, such a conclusion still leaves to the respondents the right to bargain over the random testing as a major dispute in the event the arbitrator finds that it is not authorized by the current agreements. In that case, SEPTA would have no choice but to follow the Section 6 procedures. But an arbitrator, not a court, should decide in the first instance whether the current contract encompasses the random testing.

II. THE DECISION OF THE THIRD CIRCUIT WITH RESPECT TO RETURN TO WORK TESTING CONFLICTS IN PRINCIPLE WITH OTHER CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW.

A. In Not Recognizing That Return To Work Testing Is Related Solely To A Routine Fitness For Duty Determination, The Third Circuit Has Created A Conflict In Principle With Decisions Of The District Of Columbia And Fifth Circuits.

It is well-established and accepted that a medical examination is routinely performed by SEPTA's Medical Department at the time an employee returns to work from a prolonged (more than thirty (30) day) absence. The purpose of this examination is to establish the employee's fitness for duty. Although the observation of an employee during the examination by a physician *might* disclose a *manifest* alcohol or drug problem, a drug and alcohol screen is nevertheless required, since, as the district court correctly found, "[m]any drugs have delayed, residual or chronic effects not ascertainable through behavioral observation." A-46. For that very reason the medical examination conducted by SEPTA has historically included the collection and analysis of a variety of body fluids. The Court of Appeals nevertheless affirmed the District Court's injunction against the return to work testing provided for in SEPTA's Integrated Program.

The Third Circuit's decision conflicts in principle with the decision of the District of Columbia Circuit in *Jones v. McKenzie,* 833 F.2d 335 (D.C. Cir. 1987), *petition for cert. filed, sub nom. Jenkins v. Jones,* 57 U.S.L.W. 3017 (U.S. April 15, 1988)(No. 87-1706) and with the decision of the Fifth Circuit in *National Treasury Employees Union v. Von Raab,* 816 F.2d 170 (5th Cir. 1987), *cert. granted,* 108 S.Ct. 1072 (1988). This

Court granted the petition for Writ of Certiorari in *Von Raab* and heard oral argument in that case on November 2, 1988.

In *Jones,* the court held that it was not unreasonable, in light of the relevant safety considerations, to require drug testing as part of a routine medical examination for school bus attendants. SEPTA's return to work testing is manifestly related to a fitness for duty determination and is thus analytically the same as the school district's routine medical examinations. The safety considerations present in the operation of a system of mass transportation in the metropolitan Philadelphia area are no less compelling. To deprive SEPTA of the ability to conduct a drug and alcohol screen in the course of its routine return to work physical examinations is contrary to the rationale and holding of *Jones* and improperly endangers SEPTA's passengers and, indeed, SEPTA's employees themselves. See also *Wrightsell v. City of Chicago,* 678 F.Supp. 727, 733-34 (N.D. Ill. 1988) (Testing "as part of a regular medical examination required after return from thirty (30) days or more of leave" approved, the addition of a drug screen to urinalysis is a "minimal intrusion", and because it is conducted under specified circumstances, the likelihood of abuse or harassment is reduced.); *Amalgamated Transit Union, Division 1279 v. Cambria County Transit Authority,* 691 F.Supp. 898, 904 (W.D.Pa. 1988) ("[T]esting as part of a regular medical examination works a minimal intrusion on the plaintiff's Fourth Amendment privacy interests" and "a routine medical examination takes place in a manner likely to allay anxieties.").

In *Von Raab,* the court held that the United States Custom Service Program requiring a drug screening by urinalysis of employees seeking transfer to certain jobs was reasonable because of the government's interest in employing individuals for key positions in drug enforcement who were not drug users. 816 F.2d at 172-173.

Although *Von Raab* did not address drug testing in a transportation setting, the Customs Service's drug testing program, like that of the School District in *Jones* and here in SEPTA, was based on fitness for duty. Even though the Commissioner described the Service as "largely drug free", 816 F.2d at 173, the court found that the testing, as "a condition of assignment", was justified because of the nature and responsibilities of the jobs at issue and to assure both the integrity of the Customs Service and the absence of possible moral risk in the applicants' performance. 816 F.2d at 179. Certainly, SEPTA's obligations to the public in operating a safe mass transportation system are at least equal in importance to those of the Custom Service in enforcing the drug laws. Thus, the Third Circuit's affirmance of the injunction against return to work testing is contrary to the rationale and holding of *Von Raab* as well as *Jones*.

This conflict presents a serious dilemma for those who are charged with the operation of transportation systems, and particularly the operation of mass transportation systems such as SEPTA, where serious drug and alcohol problems have occurred, accidents have resulted, and a carefully designed program with prevention and rehabilitation as its primary goals has been implemented, only to have one of its principal tools enjoined. The Court should grant certiorari in order to resolve the conflict in principle and provide guidance to those responsible for these vast safety-sensitive operations.

B. The Question of The Constitutionality Of Return To Work Testing Is Of Such Great Importance That The Court Should Grant Certiorari Even If There Were Not A Conflict In Principle In The Circuits.

The Third Circuit inconsistently sustained SEPTA's right as a matter of Constitutional law to conduct the testing for drug and alcohol use on a random basis, but

not in the course of routine return to work physical examinations. The issue presented by the Court of Appeals' affirmance of the injunction against return to work testing is of such great public importance that the Court should grant certiorari, even if there were not a conflict between the circuits.

The issue is certainly of great moment to the public in the Delaware Valley, which uses SEPTA's mass transportation system for over 300,000,000 passenger trips per year. But it is of no less moment to travelers everywhere who are dependent upon the safe and efficient operation of vehicles of mass transportation, all of whom are riding with implicit trust in the fitness for duty of the operators of those vehicles.

The proper extent of an operator's rights is also of great public significance. Do those rights preclude drug and alcohol testing during a scheduled medical examination upon return to work to confirm fitness for duty? Do those rights preclude such testing where drug and alcohol use has been demonstrated to constitute a clear and present danger to the traveling public? Do those rights preclude such tests where actual test results show positive findings in one out of ten non-disciplinary returnee cases despite the fact that the tests are *scheduled* and the employee can control the actual timing of his or her test? Do those rights preclude such tests where they are conducted not for punitive purposes, but rather for a rehabilitative purpose as part of an integrated program of education, employee assistance, and testing?

SEPTA strongly believes that the operator's rights do not and cannot preclude such testing and that the Third Circuit was therefore in error. The Court should thus grant certiorari for the further purpose of determining the proper manner by which such interest and duties on the one hand, and employee rights on the other hand, should be balanced against one another.

CONCLUSION

For each of the foregoing reasons, SEPTA respectfully urges the Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated March 8, 1989

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 88-1160 and 88-1206

TRANSPORT WORKERS' UNION OF
PHILADELPHIA, LOCAL 234,
Appellant in No. 88-1206

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Appellant in No. 88-1160

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 87-0389)

NO. 88-1161

TRANSPORT WORKERS UNION
OF AMERICA, LOCAL 2013

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY
and
LOUIS F. GOULD, Jr., Esquire, Individually and in his official capacity as Chairman of the Board of SEPTA; ROBERT J. THOMPSON, Individually and in his official capacity as Vice Chairman of the Board of SEPTA; BRIAN W. CLYMER; JUDITH E. HARRIS, Esquire; MARY C. HARRIS, THOMAS M. HAYWARD, C.P.A.; FRANK W. JENKINS, Esquire; RICHARD E.

KUTZ, Esquire; DAVID W. MARSTON, Esquire;
JAMES C. McHUGH and FRANKLIN C. WOOD,
Individually and in their official capacities as
Members of the Board of SEPTA,

Appellants

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 87-0446)

NOS. 88-1162 and 88-1207

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
DIVISION 71 and BROTHERHOOD OF
LOCOMOTIVE ENGINEERS and
THOMAS C. BRENNAN,

Appellants in No. 88-1207

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY
and
LOUIS F. GOULD, Jr., Esquire, Individually and in
his official capacity as Chairman of the Board of
SEPTA; ROBERT J. THOMPSON, Individually and in
his official capacity as Vice Chairman of the Board of
SEPTA; BRIAN W. CLYMER;
JUDITH E. HARRIS, Esquire; MARY C. HARRIS;
THOMAS M. HAYWARD, C.P.A.; FRANK
W. JENKINS, Esquire; RICHARD E. KUTZ, Esquire;
DAVID W. MARSTON, Esquire; JAMES C. McHUGH
and FRANKLIN C. WOOD, Individually and in
their official capacity as Members of the Board of
SEPTA,

Appellants in No. 88-1162

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 87-0448)

NOS. 88-1163 and 88-1208

UNITED TRANSPORTATION UNION,
BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION
EMPLOYEES, BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES,
BROTHERHOOD OF
RAILROAD SIGNALMEN,
Appellants in No. 88-1208

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Appellant in No. 88-1163

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 87-0455)

Argued August 30, 1988

Before: SLOVITER, GREENBERG and
COWEN, *Circuit Judges*

(Opinion filed December 28, 1988)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

This case presents this court for the first time with the issue of the constitutionality of random and return-to-work drug and alcohol testing of public employees holding "safety sensitive" positions within the public transportation authority serving the Philadelphia metropolitan area.[1] The district court upheld the constitutionality of the random drug testing policy, but found the addition of return-to-work testing to be unconstitutional. The court enjoined commencement of random testing of those employees covered by the Railway Labor Act, pending settlement of the dispute through the conciliation procedures specified in the Act. *Transport Workers' Union Local 234 v. Southeastern Pennsylvania Transportation Authority,* 678 F. Supp. 543 (E.D. Pa. 1988).

The Unions argue that indiscriminate use of random drug tests to ferret out illegal drug use by public employees is irreconcilable with the guarantee against unreasonable government intrusion on individual privacy of the Fourth Amendment. We do not underestimate their concern that the public clamor about the nation's drug problem creates the risk that judgments may be distorted in evaluating the constitutionality of government measures taken to curb this crisis. Nonetheless, in light of this court's precedent sustaining drug testing in other occupations and in light of the record presented in this case where the public transportation

1. Two cases presently before the Supreme Court present facets of the issue of drug testing by public employers. *See Railway Executives Ass'n v. Burnley,* 839 F.2d 575 (9th Cir.), *cert. granted,* 108 S. Ct. 2033 (1988) (post-accident testing of railroad workers); *National Treasury Employees Union v. Von Raab,* 816 F.2d 170 (5th Cir. 1987), *cert. granted,* 108 S. Ct. 1073 (1988) (testing in conjunction with voluntary request for transfer or promotion). Neither of these cases, however, directly presents the issue of random testing raised by the appeals before us.

authority has documented a serious drug problem among its employees, to which it has traced accidents causing injury to the public, we conclude that the random drug testing at issue here is not facially invalid under the Fourth Amendment.

We also uphold the district court's finding that the transportation authority failed to justify the reasonableness of its return-to-work drug testing policy. Finally, we uphold the injunction imposed on commencement of random testing of employees covered by the Railway Labor Act.

I.

Background and Procedural History

Appellants/cross-appellees in this case ("the Unions") are the Transport Workers Union Local 234 ("TWU"), which represents approximately 5,700 of SEPTA's 6,500 employees, and five unions which represent SEPTA employees under section one of the Railway Labor Act ("RLA"), 45 U.S.C. § 151, Sixth (1982); the Brotherhood of Locomotive Engineers, Division 71; the Brotherhood of Locomotive Engineers; the Brotherhood of Railway, Airline and Steamship Clerks; the Brotherhood of Maintenance of Way Employees; and the Brotherhood of Railroad Signalmen ("the Railway Unions").

Appellees/cross-appellants, the Southeastern Pennsylvania Transportation Authority and some of its officers and Board members (referred to collectively as "SEPTA" or "the Authority"), operate mass transportation facilities in the five-county Philadelphia metropolitan area. SEPTA is an agency of the Commonwealth of Pennsylvania, currently organized under the authority of the Pennsylvania Urban Mass Transportation Act of January 22, 1968, P.L. 42, No. 8, as amended, 55 Pa. Stat. Ann. §§600.101-600.407 (Purdon Supp. 1988). SEPTA operates subways, railroads, buses, streetcars,

and trackless trolleys, and maintains stations, depots, platforms, tracks, and other installations. In 1986, SEPTA accommodated more than 1.2 million passengers on its transit systems on an average week day.

On January 16, 1987, SEPTA publicly announced, without prior notice or consultation with the Unions, that it planned to begin administering random urinalysis tests to detect the presence of psychotropic drug metabolites and alcohol in employees' body systems. On January 21 and 26, 1987, the Unions filed complaints against SEPTA's plan in the United States District Court for the Eastern District of Pennsylvania, alleging that SEPTA's program violated their members' constitutional rights under the Fourth and Fourteenth Amendments.

The Railway Unions also alleged that SEPTA had violated section 6 of the RLA, 45 U.S.C. §156 (1982), by unilaterally instituting a random drug testing policy without serving notice and exhausting the mediation and conciliation procedures mandated by the RLA before implementation of changes in working conditions or rules under a labor contract.

In early February 1987, SEPTA posted an additional order at its offices announcing that all employees returning to work after an absence from employment of over thirty days for any reason other than vacation would be required to submit to urinalysis testing. The Unions filed amended complaints alleging that SEPTA's return-to-work testing policy also violated the constitutional rights of their members.

After four days of hearings, the district court entered a preliminary injunction enjoining SEPTA from implementing its random drug and alcohol testing program. The court expressed various concerns about, *inter alia,* the plan's failure to include reliable confirmatory testing procedures, failure to use a less intrusive breathalyzer test to detect the presence of alcohol in employees' body systems, and the lack of justification of the scope of the

job positions to be tested. It directed SEPTA to submit any further plan for random testing to it.

In July 1987, after SEPTA published the first draft of a revised drug and alcohol testing and education program which it had designed to respond to the district court's concerns, it moved to vacate the court's preliminary injunction. The case went to trial in September 1987, at which time both SEPTA and the Unions introduced extensive expert testimony about testing technology and the effects of drug use. SEPTA also presented evidence of the scope and severity of the drug problem affecting its workforce.

On September 25, 1987, the district court again delivered bench remarks criticizing various aspects of SEPTA's proposed program. SEPTA again made revisions in its proposal, and resubmitted it to the Unions and the court.

On January 19, 1988, the district court entered its final order and issued a memorandum opinion. The order dissolved the preliminary injunction against SEPTA and denied the Unions' request for a permanent injunction against the random testing component of SEPTA's drug and alcohol testing program, but granted a permanent injunction against implementation of SEPTA's return-to-work testing policy. The court also enjoined SEPTA from commencing random drug testing of workers represented by the Railway Unions, holding that unilateral implementation of such a policy gave rise to a "major dispute" within the meaning of section 6 of the RLA and thus required SEPTA to exhaust the mediation and conciliation procedures specified in that Act. Finally, the court ordered that any final revisions of SEPTA's drug and alcohol testing program be submitted for review prior to implementation, SEPTA filed a motion asking the court to amend its order to allow return-to-work testing, which the district court denied. This appeal and cross-appeal followed.

The final random testing proposal approved by the district court subjects approximately 2,600 workers to random urinalysis testing over a one-year period, and approximately 5,400 workers per year to random breathalyzer testing. Testing is limited to "operating engineers" in "safety senstive" positions.[2]

Under the breathalyzer testing program for alcohol, an employee will be considered to test positive if two successive tests yield blood alcohol levels of .04 percent or higher. Under the urinalysis test designed to detect drug metabolites, initial screening will be conducted by an EMIT immunoassay. Positive results obtained by this screening method will be subject to confirmation testing by gas chromatography/mass spectrometry (GC/MS). The parties have stipulated that this two-step procedure is reliable. Employees may also request an additional confirmatory test at their own expense if they wish.

Detailed specifications assure chain of custody and proper laboratory controls. SEPTA will not voluntarily disclose test results to law enforcement officials, and results will be kept confidential within the medical department, being disclosed only on a need-to-know

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2. Specifically, the following positions are covered:
   1) Engineer, Bus Person, Surface Train Person, Subway-Elevated Trainperson
   2) Construction Equipment Operators
   3) Superintendents of Operations, Towerpersons, Train Dispatchers, and Power Dispatchers
   4) Signal Maintainers
   5) Power Distribution Maintainers
   6) Vehicle, Mechanical, Track and Structural Inspectors
   7) Welders
   8) Sworn SEPTA police officers
   9) Any employee authorized to carry a firearm on duty
   10) Instructors and supervisors of the foregoing.

The district court disallowed classification of "Conductors and Passenger Attendants" as operating engineers unless it could be shown that these were safety sensitive positions. 678 F. Supp. at 552.

basis. Employees who are taking prescription medication must inform SEPTA's medical department of this fact. The department will make "fitness for duty" determinations with respect to these employees in consultation with the physician prescribing the medication.

Random testing is scheduled to begin ninety days after SEPTA institutes an educational campaign and thirty days after it begins to offer an Employee Assistance Program ("EAP") administered by an outside provider. All employees whose urine or breathalyzer tests produce positive results will be given a "not fit for duty" classification, removed from their jobs, and required as a condition of retaining their employment with SEPTA to enter an EAP for counseling and treatment. After successful completion of treatment, employees will be assigned to an alternative job for an observation period of up to ninety days during which they may be tested at any time. 678 F. Supp. at 547. After employees are returned to their prior positions, they are subject to follow-up tests on an unannounced basis for twelve months and on a scheduled basis for up to two years thereafter.

As an alternative to mandatory treatment following a positive test result, employees may voluntarily refer themselves to the EAP before being tested. Employees who voluntarily enter treatment will be removed from duty until completion of treatment and assigned to alternative duty for ninety days thereafter, for which they will be paid at that job's wage rate. They will be subject to unannounced follow-up testing for six months and scheduled testing for one year thereafter. Employees who voluntarily refer themselves to the EAP are given one additional chance to obtain treatment if their urine produces a positive result after treatment.

Employees who refuse to be tested, receive positive test results after treatment, or refuse to undergo treatment and counseling after a positive result will be discharged.

II.

Analysis

A.

The Legal Framework

1. *General Fourth Amendment Principles*

There is no dispute that, as a government agency, SEPTA is bound by the strictures of the Fourth Amendment. Contrary to the argument put forth by SEPTA in this appeal, it is by now well settled that government drug testing of employees constitutes a search or seizure for purposes of the Fourth Amendment. *Railway Labor Executives' Ass'n v. Burnley,* 839 F.2d 575, 580 (9th Cir.). *cert. granted,* 108 S. Ct. 2033 (1988); *Everett v. Napper,* 833 F.2d 1507, 1511 (11th Cir. 1987); *Jones v. McKenzie,* 833 F.2d 335, 338 (D.C. Cir. 1987); *National Treasury Employees Union v. Von Raab,* 816 F.2d 170, 176 (5th Cir. 1987), *cert. granted,* 108 S. Ct. 1072 (1988); *McDonell v. Hunter,* 809 F.2d 1302, 1307 (8th Cir. 1987); *Shoemaker v. Handel,* 795 F.2d 1136, 1141 (3d Cir.), *cert. denied,* 479 U.S. 986 (1986). The same principle is applicable to a compelled breathalyzer test for alcohol. *See, e.g., Burnley,* 839 F.2d at 580; *Shoemaker,* 795 F.2d at 1141-42.

The Fourth Amendment guarantees the right of the people against "unreasonable search and seizure." Except in certain carefully defined classes of cases, searches without consent or a valid search warrant are unreasonable. *O'Connor v. Ortega,* 480 U.S. 709, 720 (1987) (plurality opinion) (quoting *Mancusi v. DeForte,* 392 U.S. 364, 370 (1968)). In a certain narrow class of exceptions, however, where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable," *New Jersey v. T.L.O.,* 469 U.S. 325, 351 (1985) (Blackmun, J., concurring), a search may be reasonable even though it

is not conducted pursuant to a probable cause determination. *Id.* at 340; *see also O'Connor v. Ortega,* 480 U.S. at 725.

In such circumstances, intrusions on employees' constitutionally protected privacy interests must be evaluated by "the standard of reasonableness under all the circumstances." *Id.* at 725-26. Such an evaluation involves "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion,' " *Id.* at 719 (quoting *U.S. v. Place,* 462 U.S. 696, 703 (1983)).

2. *Administrative Searches*

The Unions argue that under the constitutional equation used to determine if body fluid testing is reasonable, there must always be particularized or individualized suspicion. In essence, they argue that random testing for drugs or alcohol is never permissible under the Fourth Amendment. The difficulty with their argument is that this circuit has already rejected precisely such a contention, and we are bound to those holdings.

In two prior cases, we applied "the administrative search exception to the Fourth Amendment warrant requirement" to uphold drug testing without individualized suspicion of employees in "highly regulated industries." *Policeman's Benevolent Ass'n. Local 318 v. Township of Washington,* 850 F.2d 133, 135 (3d Cir. 1988); *Shoemaker v. Handel,* 795 F.2d 1136, 1142-43 (3d Cir.). *cert. denied,* 479 U.S. 986 (1986).

The administrative search exception has been used to permit legislatively authorized warrantless inspections of commercial property in cases in which the government interest in conducting the search would be frustrated by requiring prior notice. *See Donovan v. Dewey,* 452 U.S. 594, 598-603 (1981). Cases applying

the administrative search exception generally involve statutory schemes aimed at ensuring safety or other "substantial" government interests. *See, e.g., New York v. Burger,* 107 S.Ct. 2636, 2646-47 (1987) (upholding warrantless inspection of automobile junkyards where state had substantial interest in reducing growing problem of motor vehicle theft associated with this industry); *Donovan v. Dewey,* 452 U.S. at 603 (permitting warrantless safety inspections of mines); *United States v. Biswell,* 406 U.S. 311, 316-17 (1972) (approving warrantless searches pursuant to gun control legislation); *see also Colonnade Catering Corp. v. United States,* 397 U.S. 72, 76-77 (1970) (approving congressional scheme of warrantless searches and seizures in liquor industry in light of long history of regulation of this industry).

In *Shoemaker,* this court made a substantial leap beyond the application of the administrative search exception to commercial property by applying that exception to uphold random urine testing of jockeys mandated by the New Jersey Racing Commission under its statutory power to regulate horse racing in that state. We stated that "while there are distinctions between searches of premises and searches of persons, in the intensely-regulated field of horse racing, where the persons engaged in the regulated activity are the principal regulatory concern, the distinctions are not so significant that warrantless testing for alcohol and drug use can be said to be constitutionally unreasonable." 795 F.2d at 1142. Thereafter, in *Policeman's Benevolent Association,* 850 F.2d at 141, we categorized a township's random drug testing program for police officers as an administrative search and upheld the program against a facial challenge. We explained that a drug testing program will come within the administrative search exception if it is (1) based on a strong state interest in determining whether employees are using illegal substances; and (2) directed at an industry that is

pervasively regulated in such a manner that employees' justifiable privacy expectations are diminished. *Id.* at 136.

The Unions do not argue that SEPTA's drug testing program fails to meet the first prerequisite for administrative searches since they concede that protection of the public safety is an important government interest. The Unions argue, however, that the administrative search exception is inapplicable because there is no basis for finding a diminished expectation of personal privacy from the prior government regulation of the transportation industry.

We agree that the regulations to which SEPTA points differ from those governing jockeys in New Jersey and police conduct in Washington Township. Because the police officers in *Policeman's Benevolent Association,* 850 F.2d at 138-41, were part of a "quasi-military" organization, they were subject to extensive personal regulations, including conduct rules for their private lives, a rule requiring off-duty carrying of a firearm, and the requirement of constant readiness for duty. Although the jockeys in *Shoemaker,* 795 F.2d at 1141-42, did not have the "awesome . . . power" to arrest and detain citizens that distinguishes police officers, *Policeman's Benevolent Ass'n,* 850 F.2d at 141, there is intense regulation of horse racing in New Jersey, including the licensing of all employees in the industry, which is designed to instill confidence in the integrity of the horse racing industry. This led us to reason that because the Racing Commission "historically . . . exercised its rulemaking authority in ways that have reduced the justifiable privacy expectations of persons engaged in the horse-racing industry," jockeys who accepted a state license did so with knowledge that the Commission would exercise its power to conduct warrantless searches. *Shoemaker,* 795 F.2d at 1142.

Although the enabling legislation cited by SEPTA establishes that public transportation in Pennsylvania is

a highly regulated industry, *see* 55 Pa. Stat. Ann. §§600.101 – 600.407 (Purdon Supp. 1988), SEPTA does not argue that its regulations, like those involved in our prior cases, implicated the private conduct of the workers themselves. Thus, contrary to SEPTA's argument, the regulatory scheme on which SEPTA relies is not equivalent to the extensive personal regulation involved in *Policeman's Benevolent Association* or even the lesser regulation in *Shoemaker*. Hence, the Commonwealth's regulation of the transportation industry in and of itself has not been shown to effect a comparable diminution of employees' expectations of personal privacy.[3] Therefore, the testing in this case cannot be upheld as an administrative search.

Contrary to the way the parties have read our cases, the standard for sustaining administrative searches does not represent an independent line of Fourth Amendment analysis. Our reference to administrative searches as an "exception" was as an exception to the warrant requirement. As the plurality opinion in *O'Connor v. Ortega* makes clear, although "the appropriate standard for administrative searches is not probable cause in its traditional meaning," administrative searches are merely one illustration of the application of the reasonableness standard arising out of the "careful balancing of governmental and private interests." 480 U.S. at 722-23. Thus, while we cannot uphold SEPTA's random drug and alcohol testing policy as an administrative search because of the absence of evidence of regulation

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3. SEPTA has not relied on the Federal Railroad Administration (FRA) regulations that authorize metropolitan passenger railroads to conduct post-accident, for-cause, and pre-employment drug and alcohol tests of employees, 49 C.F.R. §219.1-.505 (1987). We do not have before us the relevance, if any, of the most recent regulations of the FRA authorizing random drug testing of transportation workers, *see* 53 Fed. Reg. 47, 102 (1988) (to be codified at 49 CFR Parts 217 and 219), which were not in effect at the time of either the trial or the oral argument before us.

directed to the employees affected, we proceed to consider it under the more inclusive analysis of "reasonableness under all the circumstances" articulated by the Supreme Court in recent cases.

3. *The Balancing Test*

When justification for a warrantless search conducted without probable cause is sought on the basis of the balancing of the government interest and the individual's privacy expections, we must apply a two-part test. Courts must look, first, to whether the search was "justified at its inception," and, second, to whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *New Jersey v. T.L.O.,* 469 U.S. at 341 (quoting *Terry v. Ohio,* 392 U.S. 1, 20 (1968)).

Obviously, any erosion of the probable cause standard of the Fourth Amendment must be scrutinized with great care because the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.' " *Winston v. Lee,* 470 U.S. 753, 760 (1985) (quoting *Schmerber v. California,* 384 U.S. 757, 767 (1966)). Individuals cannot be said to relinquish all expectations of privacy simply because they participate in spheres that are regulated by government. *See Delaware v. Prouse,* 440 U.S. 648, 663 (1979) ("[P]eople are not shorn of all Fourth Amendment protection . . . when they step from the sidewalks into their automobiles."). "The reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute." *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 321 (1978).

B.

Application of the Law to this Case

We note at the outset that the constitutional issue presented for our review in this case is a narrow one. We are presently called upon to rule on the constitutionality of SEPTA's random and return-to-work drug and alcohol testing policies as described on the face of its final revised proposal; the application of these policies in practice is not before us for review at this time.[4] Our review of the district court's application of constitutional law under the Fourth Amendment is plenary.[5]

1. *The Constitutionality of SEPTA's Random Testing Program*

a. *The "Initial Justification" for Random Testing*

Even within the narrow category of cases in which the Court has found that "special needs" justify relaxing the probable cause requirement for searches, it has generally required "individualized suspicion." *See, e.g., Terry v. Ohio,* 392 U.S. 1, 21 & n. 18 (1968) (police "pat down" searches for concealed weapons do not require probable cause but do require "specific articulable facts, . . . together with rational inferences from those facts, [that] reasonably warrant that intrusion"). However, the Court has held that the suspicion prerequisite is not an "irreducible requirement" and that under certain limited circumstances, the balance of interests between the

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4. We thus do not consider the extent to which employees sanctioned as a result of positive test results retain the right to utilize the grievance and arbitration mechanisms specified under collective bargaining agreements.

5. Although the Railway Unions' brief argues that this court should hold that SEPTA's drug testing program is invalid under Pennsylvania's Constitution, this issue was apparently not presented to the district court and thus has not been preserved for appeal. Transcript of Oral Argument at 37.

government's need to conduct the search and the degree of intrusion on the individual may justify dispensing with the individualized suspicion requirement. *See, e.g., United States v. Martinez-Fuerte,* 428 U.S. 543, 561-62 (1976) (upholding constitutionality of brief vehicle stops at fixed checkpoints to question occupants without individualized suspicion).

We agree with the Unions that the intrusion on individuals' privacy caused by drug testing is more than minimal, involving an order to perform the highly private activity of urination, an order considered by some to be "offensive to personal dignity," *Patchogue-Medford Congress of Teachers v. Board of Educ.,* 70 N.Y.2d 57, 68, 517 N.Y.S.2d 456, 461, 510 N.E.2d 325, 330 (1987); *see also Capua v. City of Plainfield,* 643 F. Supp. 1507, 1511 (D.N.J. 1986).

We do not believe that this *ipso facto* renders the search unreasonable. Although in its most recent cases discussing the reasonableness standard for Fourth Amendment search purposes, the Supreme Court did not decide whether individualized suspicion is an essential element, *see O'Connor v. Ortega,* 480 U.S. at 726; *New Jersey v. T.L.O.,* 469 U.S. at 342 n.8, this court held it was not when upholding drug testing in *Shoemaker* and *Policeman's Benevolent Association* as an administrative search. For comparable reasons, we conclude that under the balancing required by the reasonableness analysis, if the state's interest is substantial enough it may override even the intrusive searches required for urinalysis. A *fortiori,* the less intrusive search by breathalyzer testing would be sustained.

Of course, the more intrusive the search, the more substantial the governmental interest that must be shown to make the requisite balance. The state interest asserted here, that of guaranteeing the safety of the public, has been accepted in other contexts as justifying drug testing without particularized suspicion. *See, e.g., Jones v. McKenzie,* 833 F.2d at 340 (routine drug testing

of bus drivers and attendants entrusted with safety of handicapped school children justified by "significant and compelling governmental interest"); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 567 (8th Cir. 1988) (individualized suspicion not required for drug testing in nuclear power industry). *Contra Burnley*, 839 F.2d at 587-88 (invalidating post-accident drug testing of railroad employees).

As stated in *O'Connor v. Ortega*, 480 U.S. at 724, "in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct . . . [to] the public interest can be severe." The government interest in protecting public safety, often of large groups of persons traveling by mass transit, is patently of a higher order than simply maintaining the "efficient and proper operation of the workplace," found sufficient by the plurality to justify limited searches of the desk and personal files of an employee in *O'Connor*. *See* 480 U.S. at 723.

We view with amazement the opening sentence in the Railway Unions' brief that "[t]his case involves an overreaction to an exaggerated hysteria conserning the use of drugs and alcohol in our society." Brief of Certain Plaintiffs-Appellants-Cross-Appellees at 1. The enormity of the problem facing this country because of drug use is sufficiently well established to justify judicial notice.

Of course, it was SEPTA's burden to show drug use by its operating employees that poses a danger to the safe operation of its vehicles. The district court made findings that drug use by SEPTA's operating employees presents a significant safety problem and that the Authority's prior suspicion-based testing program proved insufficient "to satisfy the needs of public safety." 678 F. Supp. at 549. *Compare Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1541, 1547 (6th Cir. 1988) (random drug testing of fire fighters unconstitutional where "[t]here has been no statistical or objective evidence that the performance of any member of the

department . . . has been affected by the use of drugs") *with Jones v. McKenzie,* 833 F.2d at 336 (upholding constitutionality of routine drug tests of school bus drivers and attendants following "repeated incidents of bizarre or dangerous drug-related behavior by drivers and attendants while on duty").

There is adequate support for the district court's findings. SEPTA established that in six major accidents occurring in 1986 and 1987, collectively involving at least 89 injuries to persons, the operators of vehicles at fault tested positive for alcohol or drug metabolites. App. at 1017. The operator at fault in another accident refused to submit to a test. Further, of 262 employees tested "for cause" between January 1985 and July 1987, 82 employees (thirty-one percent) tested positive for drug metabolites or alcohol. App. at 1166. Twelve percent of the "new hires" given drug tests within the same period produced positive results (116 of 1,004 tested). App. at 1165. The Unions do not argue that these are statistically insignificant figures. Instead, they argue that the presence of metabolites, particularly of marijuana metabolites, does not demonstrate present impairment and, in the case of employees "at fault," does not demonstrate causation of the accident.

Although there is no evidence of direct correlation between the presence of drug metabolites and impairment at the time of testing, users are frequently able to mask their impairment so that it is not apparent. App. at 347. Also, SEPTA produced testimony establishing that use of drugs in itself results in significant impairment. There was testimony that long after all traces of drugs have left the system, there are significant delayed and chronic impairment effects.

As Union witness Dr. John P. Morgan acknowledged, individuals whose drug use does not render them obviously impaired in performing routine work tasks can display a lack of flexibility and inability to respond to sudden changes or emergency situations. App. at 771.

The acute effects of marijuana include distortion of judgment and loss of good judgment, a decrease in alertness and caution, impairment of visual, auditory and space perception, and loss of propriety of responses, such as ability to steer. App. at 373. Cocaine ingestion typically causes aggressiveness, overreaction, and misperception. *Id.* at 378. According to SEPTA expert witness Robert J. Pandina, residual impairment effects of marijuana and cocaine include irritability, agitation, lack of alertness and awareness, and memory deficits. App. at 356. After the stimulative effects of cocaine have worn off, users' functioning becomes depressed and slower, and judgment remains impaired. App. at 378. Other delayed impairment effects occur during the period in which individuals are experiencing withdrawal from a drug on which they have become physically dependent. App. at 782, Morgan Testimony. Chronic users will experience long-term effects including a desire to increase the dose of drug taken, which will in turn increase the probability of impairment. App. at 360, Pandina Testimony.

While the Unions downplay the statistical evidence of marijuana use, a SEPTA witness testified that the impairment effects of marijuana as measured by the ability to perform certain tasks, such as simulated driving, include statistically significant effects on performance lasting for as long as twelve hours after use in some individuals. App. at 523.

In light of the evidence connecting impairment with drug use, it was appropriate for SEPTA to design its program in an effort to detect drug users. It was not required to limit its detection efforts to those employees whose then-current impairment could be detected, particularly in light of the testimony by experts offered by both the Unions and SEPTA that current urine testing technologies do not permit the detection or measurement of current impairment. *See* App. at 540, 548, 747, 780, 354-55.

The Unions next argue that SEPTA's program should be rejected because there are less restrictive means to deal with the drug problem of transit employees. The Court has made clear that the least restrictive means analysis applied in cases implicating the First Amendment is not applicable to cases arising under the Fourth Amendment. *Colorado v. Bertine,* 479 U.S. 367, 373-74 (1987) (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983)); *Bell v. Wolfish,* 441 U.S. 520, 559 n.40 (1979) (quoting *United States v. Martinez-Fuerte,* 428 U.S. 543, 556-57 n.12 (1976)). Of course, a factor relevant to the inquiry into the reasonableness of the search at its inception would be whether less intrusive but equally effective means to the same goal are available. There has been no such showing here. In light of the district court's finding that "[m]any drugs have delayed, residual or chronic effects not ascertainable through behavioral observation," 678 F.Supp. at 550, and that SEPTA's operating employees often work in circumstances which preclude close supervision, making it infeasible to monitor performance or detect signs of drug-induced impairment by direct observation, the Unions have not shown that there is any less intrusive but equally effective means of detecting employee drug use. *Id.*

Finally, the Unions' argument that SEPTA can rely on its already existing policy of testing for drug use after accidents "chargeable" to driver fault[6] does not effectively address the public interest in detecting employees

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6. SEPTA's admitted failure to administer a drug test after every chargeable accident is disturbing but we cannot evaluate on this record the validity of its explanation that its failure to test stems from disputes with the Unions as to how an accident should be classified. Transcript of Oral Argument at 40-43. We cannot avoid noting that the district court expressed its frustration at the sorry state of labor relations among the parties to this case. *See* 678 F. Supp. at 548 n. 12.

in safety sensitive positions with drug problems *before* accidents occur.

The safety justification for SEPTA's drug testing policy, SEPTA's documentation of drug use problem among its workforce, the evidence of the deleterious effect of drug use, and SEPTA's showing of positive tests for drugs or alcohol by operating personnel at fault in accidents are sufficient bases for us to conclude that the random testing policy is constitutionally justified at its inception.

b. *The Relationship of the Search to the Need*

The Supreme Court has held that even when the search program is designed with important public safety considerations in mind, to survive the required Fourth Amendment balancing there must be sufficient safeguards to protect against abuse of official discretion in deciding whom and how to search and the search must be sufficiently productive to qualify as a reasonable law enforcement practice. *Delaware v. Prouse,* 440 U.S. 648, 655, 660, 662 (1979).

The testing policy that developed as a consequence of the district court's supervision of this case is limited to employees whose job performance implicates public safety. Even the non-operating personnel included, such as signal operators and repair persons, perform functions closely connected to the public safety and their classification as "safety sensitive" is justified.

SEPTA's random drug testing program is also reasonable with respect to the type of testing conducted. Following the district court's instructions, SEPTA substituted less intrusive testing where possible, such as breathalyzer tests to detect blood alcohol levels. Although urine testing can be used to reveal private information other than drug use, *see National Treasury Employees Union v. Von Raab,* 816 F.2d 170, 175-76 (5th Cir. 1987), *cert. granted,* 108 S. Ct. 1072 (1988)

(testing may disclose pregnancy and certain psychological and physical illnesses), no allegation has been made that SEPTA's plan contemplates use of body fluid samples to detect such information. We are satisfied that, as described, the plan contains sufficient safeguards, in the form of confidentiality, chain of custody, verification, and random selection procedures, to protect against abuse of discretion by implementing officials. Any improper use of the personal information obtainable through SEPTA's testing program must await a challenge to the program as applied.

As noted above, one of the Unions' principal challenges to the reasonableness of SEPTA's random drug testing policy is based on their contention that the mere presence of drug metabolites in an employee's urine is not indicative of on-the-job impairment. However, as the district court explained, the expert psychologist who designed SEPTA's revised program testified that SEPTA's drug testing was aimed at detecting chronic abusers rather than on-the-job impairment. 678 F. Supp. at 548. The district court was satisfied that a sufficient nexus existed between this rationale for testing and the information gleaned through the use of urine tests. As we concluded above, since the evidence shows that chronic users present a threat to the safety of the transit system, we do not regard it as fatal that the tests are designed to uncover drug users rather than impairment.

It follows that SEPTA has satisfied the second prong of the "reasonableness under all the circumstances" standard, and that its program for random testing for drugs and alcohol satisfies the rigorous inquiry required under that standard.

2. *Return-to-Work Testing*

As we noted above, the district court found that the component of SEPTA's proposed drug testing program

which imposed body fluid testing on all employees who returned to work following absences for 30 days for any cause such as illness, on the job injury, leave of absence, reinstatement from discipline, or other absence (other than vacation), failed constitutional muster. The court found such testing was not justified at its inception because the required physical examination would identify employees who were clearly not fit for duty. *See* 678 F. Supp. at 551. Since those employees were also subject to the extensive random testing program and SEPTA had not shown that return-to-work testing was an "integral part" of a carefully considered program designed to meet a substantial need, it had failed to meet its burden to justify the need for such testing. *Id.*

Return-to-work testing must be justified either as part of a truly random testing program which does not single out a specified group or on the basis of particularized suspicion. Since the random testing which we are sustaining will include employees returning to work, SEPTA must justify its return-to-work testing on the basis of some particularized suspicion. It has, however, failed to present any evidence that the employees returning to work present some unique risk directly related to drug or alcohol use. Thus, SEPTA has not shown that this aspect of its program is initially justified or that testing of all employees returning after an absence for whatever cause has any relationship to the articulated need for the program. We will therefore not disturb the court's injunction against return-to-work testing.

III.

The RLA Injunction

SEPTA's challenge to the district court's injunction of the testing policy as applied to those employees covered by the RLA must be rejected on the basis of our recent decision in *Railway Labor Executives' Association v. Conrail,* 845 F.2d 1187 (3d Cir.), *cert. granted,*

109 S. Ct. 52 (1988). This case does not lose its status as controlling precedent because the Supreme Court has agreed to review the decision.

In *Conrail,* we held that the unilateral addition of drug testing to employee medical examinations gave rise to a "major" dispute under the RLA, entitling the parties to an injunction maintaining the status quo while they pursued the notice, mediation, and conciliation procedures mandated under sections 5 and 6 of the RLA, 45 U.S.C. §§155, 156, 845 F.2d at 1194.

A labor dispute over implementation of a drug testing program that "can 'arguably' be justified by the existing agreement," or "from habit and custom," is classifiable as a minor one and the proposed change may be implemented unilaterally. *Id.* at 1190-91 (citations omitted). In *Conrail,* we rejected the company's argument that no significant departure from past practices was involved in its addition of drug screening, which it had previously administered only "for cause," to urine tests for other substances routinely administered during periodic and return-to-work medical exams. *Id.* at 1194. We found that there were significant differences between the company's new and old practice, both because the company had switched from testing on the basis of particularized suspicion to testing without cause, and because it had substituted its previous disciplinary rule directed against employees discovered to be drug-impaired on the job with a new rule mandating discharge of employees with positive drug test results regardless of a finding of impairment. *Id.* at 1193-94.

Here, SEPTA's institution of random drug testing differs significantly from prior practice. For several decades, SEPTA's collective bargaining agreements have provided that an employee would be discharged for reporting to work under the influence of intoxicating liquors or drugs. In late 1983, SEPTA began to require urinalysis testing of workers suspected of violating this rule. When the first four employees with positive results

for marijuana metabolites were discharged, arbitrators who heard the resulting grievances reinstated the employees on the ground that the presence of marijuana metabolites in the employees' urine did not establish that they were impaired at the time of the urinalysis test.

To meet this objection, SEPTA announced in September 1985 that henceforth it would consider the presence of traces of certain intoxicants or controlled substances in the body fluids of employees on duty, reporting to duty, or off-duty but subject to duty to be a dischargeable offense *per se.* Any employee suspected of being in violation of this rule would be subject to drug testing.

In 1985, SEPTA began testing employees for drug and alcohol use on promotion or transfer to certain positions. SEPTA also began administering drug tests to employees committing "chargeable accidents," *i.e.,* accidents with respect to which the employee had been determined to be solely at fault. In July 1986, SEPTA extended this policy to require body fluid testing for any signal violation.

SEPTA argues that the Railway Unions' acquiescence, without requesting section 6 notice, in SEPTA's implementation of post-accident, suspicion-based, and transfer and promotion drug testing constitutes a waiver of their right to object to the "incremental" addition of random and return-to-work drug testing. Reply Brief of Appellees-Cross-Appellants at 11. This argument ignores the significant difference between drug testing predicated on requests for transfer or promotion, which carries an element of voluntariness, and random testing, which does not. *See National Treasury Employees Union v. Von Raab,* 816 F.2d 170, 177 (5th Cir. 1987), *cert. granted,* 108 S. Ct. 1072 (1988) (employees tested on transfer "only as a result of a process that they choose to set in motion"). Moreover, testing on the basis of reasonable suspicion of drug use bears an element of

"cause" not present in the case of random testing. *See Division 241, Amalgamated Transit Union v. Suscy,* 538 F.2d 1264, 1267 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976) ("probable cause" exists for post-accident and suspicion-based testing). Thus, SEPTA's addition of random testing to its previous policies constitutes at least as significant a change in working conditions and rules as did the addition of drug screening to routine medical examinations in *Conrail.*

SEPTA argues that because the Unions agreed to some types of workplace testing, they waived their right to object to any drug testing policy. We reject such a rule because it would deter unions from acquiescing or compromising on the drug testing question at pain of being found to have agreed to a yet broader program. The district court found "no evidence that the unions agreed to or acquiesced in widespread testing or to any significant testing without individualized suspicion." 678 F. Supp. at 551. This finding is amply supported by the record.

SEPTA also argues that it reserved its right to modify its drug testing policies through a "management functions" clause, contained in all of its collective bargaining agreements, which provides that SEPTA retains "[a]ll management functions and responsibilities which SEPTA has not expressly modified or restricted by a specific provision of this Agreement." App. at 1191, 1204, 1218, 1228, 1287. We agree with the court's ruling in *International Brotherhood of Teamsters v. Southwest Airlines Co.,* 842 F.2d 794, 804 (5th Cir.), *reh'g en banc granted,* 853 F.2d 283 (1988), that such broad management rights clauses cannot serve to exempt management from the RLA prohibition against unilateral institution of changes in rules and working conditions.

SEPTA's addition of broad random testing to its previous policies thus constitutes a major dispute for the purposes of the RLA, and the district court rightfully

enjoined SEPTA from implementing random testing of employees covered by the RLA pending exhaustion of the mediation and conciliation procedures required under that Act.

IV.

Conclusion

We are aware that our decision sustaining a random drug and alcohol testing program under the reasonableness standard recently enunciated by the Supreme Court can be viewed as a further erosion of government workers' important Fourth Amendment rights. We believe, however, that implicit in the balancing that underlies application of the reasonableness test is the recognition that there are some public interests that carry sufficient weight to justify even a more than minimal privacy intrusion. Public health and public safety concerns have traditionally been considered to be of the highest magnitude of public interest considerations. The effects of drugs on transit workers in safety sensitive positions as established in this record lead us to conclude that random testing by SEPTA is a reasonable response. We venture no opinion on the validity of such testing in other situations, and emphasize that our decision is confined to the case presently before us.

For the reasons set forth in more detail above, we will uphold the random drug and breathalyzer testing in SEPTA's program. We agree with the district court's conclusion that the return-to-work testing does not satisfy the first prong of the reasonableness test, since it has not been shown to be reasonable at its inception. We also have concluded that under the precedent of our *Conrail* opinion, random drug and alcohol testing cannot be unilaterally imposed on those workers covered by the RLA because that statute requires different procedures for major disputes.

We will therefore affirm the district court's order in all respects. Each party to bear its own costs.

A True Copy:

Teste: _____

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1160/61/62/63 and 88-1206/07/08

TRANSPORT WORKERS' UNION OF
PHILADELPHIA, LOCAL 234

vs.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until February 17, 1989.

/s/ DOLORES K. SLOVITER
Circuit Judge

Dated: Jan 19, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1160/61/62/63 and 88-1206/07/08

TRANSPORT WORKERS' UNION
PHILADELPHIA, LOCAL 234, *et al.*

vs.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until March 9, 1989.

/s/ DOLORES K. SLOVITER
Circuit Judge

Dated: Feb 16, 1989

TRANSPORT WORKERS' UNION OF PHILADELPHIA, LOCAL 234

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY.

TRANSPORT WORKERS' UNION OF AMERICA LOCAL 2013

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, DIVISION 71, et al.

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, et al.

UNITED TRANSPORTATION UNION, et al.

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY.

Civ. A. Nos. 87-0389, 87-0446, 87-0448 and 87-0455.

United States District Court, E.D. Pennsylvania.

Jan. 19, 1988.

Michael Brodie, Philadelphia, Pa., for Transport Workers' Union of Philadelphia, Local 234.

Jonathan K. Walters, Kirschner, Walters & Willig, Philadelphia, Pa., for Transport Workers' Union of America Local 2013.

Clinton J. Miller, III, United Transp. Union, Harold A. Ross, Ross & Kraushaar, Co., L.P.A., Cleveland, Ohio, and Cornelius C. O'Brien, III, O'Brien & Davis, Philadelphia, Pa., for United Transp. Union.

Mitchell Kraus, Broth. of Ry., Airline, and Steamship Clerks, Rockville, Md., for Broth. of Ry., Airline, and Steamship Clerks.

John F. Smith, III, Richard S. Meyer, Dilworth, Paxson, Kalish & Kauffman, Philadelphia, Pa., for Southeastern Pennsylvania Transp. Authority.

MEMORANDUM

LUDWIG, District Judge.

In these consolidated actions, upon the application of plaintiffs[1] and upon hearing, defendant Southeastern Pennsylvania Transportation Authority (SEPTA) was preliminarily enjoined, on February 9, 1987, from implementing a random drug testing program of its employees under SEPTA Order No. 87-1. Fed.R.Civ.P. 65(a). Thereafter, SEPTA modified its proposed program and moved to vacate the injunction. Additional evidentiary hearings occurred during which SEPTA made further changes in the program. The parties agreed to an adjudication for permanent injunctive relief. Fed.R. Civ.P. 65(a)(2).

The following decision is entered, and an accompanying order will be filed:

1. The preliminary injunction is now dissolved.

2. Plaintiffs' request to enjoin random testing as unconstitutional is denied, and subject to certain conditions, random testing will be permitted.

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1. Plaintiffs are six unions and the chairman of a local chapter of the Brotherhood of Locomotive Engineers. Fact Stip. ¶ 1-8.

3. So-called "return to work" testing, as proposed, will be enjoined as constitutionally unjustified.

4. As to the Railroad Brotherhood plaintiffs,[2] random testing will be enjoined because the proposal invoked a "major dispute" under Section 6 of the Railway Labor Act, 45 U.S.C.A. § 151 *et seq.* (West 1986), and, consequently, notice, collective bargaining, and mediation are prerequisite.

I.

Transport Workers' Union of Philadelphia, Local 234 (TWU), together with its affiliated International Union, represents 5,700 of SEPTA's 6,500 employees. The balance are members of the five other plaintiff unions, under Section 151 of the Railway Labor Act, 45 U.S.C.A. § 151, Sixth. United Transportation Union, Local 1594, also represents bus and trolley operators of SEPTA's Red Arrow division under Pennsylvania's Public Employe Relations Act, 43 P.S. § 1101 *et seq.* (Purdon Supp. 1987). SEPTA is an agency and instrumentality of the Commonwealth of Pennsylvania, under a certificate of incorporation dated February 7, 1964, and is organized under the Metropolitan Transportation Act of 1965, 66 P.S. § 2001, *et seq.* (repealed) and the Pennsylvania Urban Mass Transportation Law, *as amended,* 55 P.S. § 600.101 *et seq.* (Purdon Supp. 1987).[3]

By Act of Assembly, SEPTA is empowered to own and operate transportation facilities in the Philadelphia five-county metropolitan area. Its present operations include the City Transit Division; the Suburban Transit

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2. These are the United Transportation Union, Brotherhood of Locomotive Engineers, Brotherhood of Railway, Airline and Steamship Clerks, Brotherhood of Maintenance of Way Employees, and Brotherhood of Railroad Signalmen.

3. The members of SEPTA's board of directors are named as individual defendants and in their official capacities.

Division (Red Arrow-Delaware County); the Frontier Division (Montgomery County); and the Regional Railroad Division, which provides commuter rail service between the city and suburban counties. The City Transit Division operates the Broad Street and Market Street subways, the Frankford Elevated, and many bus, streetcar and trackless trolley routes in Philadelphia. SEPTA also maintains numerous stations, depots, platforms, tracks, shops and other installations. Employment terms and conditions are set forth in collective bargaining agreements with plaintiff unions.

SEPTA's operational area covers about 2,200 square miles. The City Transit Division accommodates some 798,000 passenger trips daily; the Suburban Transit Division, 66,000; the Regional Rail Division, 78,000. In 1986, more than 350 million passenger rides occurred on SEPTA vehicles. On an average weekday in 1986, the number exceeded 1.2 million. City buses and trolleys reach speeds up to 50 miles per hour; trains as high as 95 miles per hour; other high speed vehicles, 60 miles per hour. Vehicle operators must be attentive to their work. Subway and train signal systems are complex and demanding. Braking requires vigilance and sound judgment. Some special risk factors that can affect train operation are grade crossings and trespassers on rights of way. Bad weather, unruly passengers, and crowded vehicles are problems generally. A vehicle operator must have a clear mind and the ability to react quickly and efficiently. New operators must be trained. Support staff inspect and maintain essential equipment. SEPTA police carry firearms.

The unions agree that consumption of alcohol or controlled substances can render an employee unfit for work. The need to protect the safety of passengers, pedestrians, motorists, and other employees is undisputed. For over 30 years, the collective bargaining agreements between SEPTA and TWU have provided that an employee who reports to work or who becomes

under the influence of intoxicating liquor or drugs will be discharged.

On September 20, 1985 SEPTA promulgated Order No. 85-1, which called for urine or blood testing of employees suspected of being in "possession of intoxicants or controlled substances," and which described such possession as "a dischargeable offense."[4] It also issued Order No. 85-2, which permitted "a troubled employee [one with an alcohol or drug problem] to maintain an employment relationship and have . . . [a] reasonable leave of absence to obtain treatment."

In 1986, in at least three accidents, SEPTA passenger vehicle operators appeared to have been impaired by drugs or alcohol. In a train collision December 10, 1987, an engineer and a conductor were tested positive for cocaine. Tests of two conductors also were positive for marijuana. Forty-two people were injured. In a fourth accident in 1986, the operator refused testing. In 1987, three accidents also appear to have been cocaine or marijuana related as shown by post-accident testing. Between January, 1985 and July, 1987, a total of 14 percent, or nearly one seventh, of the drug and alcohol tests taken pursuant to 85-1 were positive. The problem

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4. Rule 1 in effect in the Regional Railroad Division from January 1, 1983 to October 27, 1985 stated in part:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty or their possession or use while on duty is prohibited. Employees suspected of being under the influence in violation of this rule may be required to take a blood and/or a urinalysis test. Employees who refuse to take these tests or who are found to be under the influence as a result of tests will be subject to disciplinary procedures which may result in dismissal from the Authority's service.

Thereafter, on October 27, 1985, SEPTA issued RRD Special Instruction 1001-A2 which provided that members of the railroad unions "may be required to provide a urine sample after certain accidents and incidents or at the time the company reasonably suspects [an employee is] under the influence of, or impaired by drugs while on duty."

of substance abuse is societal. It is inescapable that the undue use of drugs or alcohol by the operator of a motor vehicle can be hazardous and potentially injurious, if not life-threatening. Where mass transit is concerned, the risk can involve large numbers of people.

SEPTA's decision to embark on unscheduled — "surprise" — testing of its employees arose from management's belief that cause or suspicion testing was ineffective to reduce on-the-job impairment. Patterned on other programs, SEPTA Order No. 87-1, issued January 21, 1987, was designed to interrelate educational prevention; treatment and rehabilitation; and monitoring and deterrence. The third element is embodied in unscheduled random testing.[5] Order No. 87-2, promulgated February 3, 1987, provided that an employee returning to work after a 30-day absence was subject to body fluid testing for drugs or alcohol.

In opposition to the testing, plaintiffs filed these actions and immediately sought injunctive relief, asserting that 87-1 violates the Fourth Amendment prohibition against unreasonable searches and seizures. They also contend that testing of employees returning to work after a 30-day hiatus under 87-2 is not constitutionally justifiable and that the entire program, as proposed, abridges the employee's confidentiality rights, and is overly broad, punitive and inappropriate.[6] The Rail Brotherhoods maintain that the issues raised by 87-1 and 87-2 constitute a "major dispute" under the Railway Labor Act. If so, the Act requires notice and exhaustion of negotiation and mediation procedures before a change in the labor contract can be effectuated. 45 U.S.C.A. §156. SEPTA has not given notice. Its view is that 87-1 and 87-2 are evolutionary outgrowths of 85-1 and are not

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5. On January 23, 1987 urine tests of 13 randomly selected employees proved negative. This was the only day on which 87-1 was implemented. Thereafter, SEPTA agreed to await the outcome of these actions.

6. Plaintiffs filed amended complaints challenging 87-2.

a radical alteration of past policies. The United Transportation Union, Local 1594, also claims that it is entitled to protective procedures under Section 1101.-701 of the Pennsylvania Public Employe Relations Act.

SEPTA was preliminarily enjoined from proceeding with 87-1 and 87-2 because the program, as evidenced, was excessively intrusive and did not carry out its objectives. A Fourth Amendment violation appeared, therefore, to be likely. Also, under the Railway Labor Act, an ultimate finding of a "major dispute" was predictable. Bench opinion, February 9, 1987.

II.

On July 27, 1987 after months of consultation with experts and union representatives, SEPTA proposed a revised program and filed a petition to vacate the preliminary injunction.[7] Extensive testimony was given by toxicologists, pharmacologists, physicians, psychologists and others in defense and in criticism of the proposal. Areas of debate were the accuracy of the testing procedures, the positive thresholds, the incidence of testing, including the categories of employees subject to testing, the inclusion of prescription medication, the definition of fitness for duty, the type and the function of the employee assistance program, the effect of passive inhalation, the role of SEPTA's medical department, and SEPTA's administration of 85-1 and 85-2 during the past two years.[8]

As set forth in the revised proposal, the purpose of the program is to enforce a fitness for duty standard.

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7. Thereafter, SEPTA continued to make revisions in response to concerns expressed by the unions and by the court.

8. With the parties' consent, a court-appointed independent expert—a psychiatrist with expertise in pharmacology—was retained. This expert reviewed the testing proposal and the testimony of the parties' experts and consulted with the parties and the court.

This standard is applied to a class known as "operating employees" and is defined as the absence from one's system of alcohol, drugs and drug metabolites above specified thresholds. About 4,400 SEPTA employees come within this classification.[9] Breath testing is to be used for alcohol detection and is to be administered under forensically acceptable conditions. A positive result requires two successive minimum levels of .04 percent. For drugs, the testing modality is urinalysis. The specimen is to be given inside a private, partitioned bathroom stall. There are detailed specifications to assure chain of custody, proper laboratory control, and scientific testing. After initial screening, a positive result is subject to a confirmation procedure by gas chromatography/mass spectrometry, which is considered to be the most accurate technology available. See *Williams v. Secretary of Navy,* 787 F.2d 552, 555 (Fed.Cir.1986).

In the educational, or preventative phase, of the program, SEPTA employees will be informed about the harmful effects of drug and alcohol abuse, the availability of treatment, and SEPTA's employee and enforcement policies. In July, 1987 SEPTA sent its employees the revised program. Regular mailings and educational presentations will be made. Random testing will not be begun until 90 days after the program goes into effect

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9. The following positions are specifically enumerated:
   1. Engineer, Bus Person, Surface Train Person, Subway-Elevated Trainperson.
   2. Conductors and Passenger Attendants
   3. Construction Equipment Operators
   4. Superintendents of Operations, Towerpersons, Train Dispatchers, and Power Dispatchers
   5. Signal Maintainers
   6. Power Distribution Maintainers
   7. Vehicle, Mechanical, Track and Structural Inspectors
   8. Welders
   9. Sworn SEPTA police officers
   10. Any employees authorized to carry a firearm on duty
   11. Instructors and supervisors of the foregoing.

and no earlier than 30 days after the proposed employee assistance program is operational.

The employee assistance program will utilize an outside provider as opposed to in-house services. Its purpose is to offer substance abuse treatment and rehabilitation. If the employee voluntarily self-refers having not had a positive test result, he can obtain a second period of treatment. While in treatment, employees are to receive unused sick pay. A post-treatment 90-day period of alternative job assignment will occur, and the employee will be subject to unannounced testing.[10] Upon two positive tests, the employee is dischargeable. An employee who tests positive on a random screening or on return to work has one opportunity for self-referral and must not test positive again. Such employee is also subject to unannounced follow up testing for 12 months and scheduled testing for two years thereafter. If treatment is refused, the employee will be discharged. Employment assistance information will be given to SEPTA's medical department, which is to maintain it as confidential. No disclosure will be made to law enforcement authorities, and availability within the medical department is to be limited to "need-to-know."

Return to work testing applies to "operating employees" who return to work after a 30-day absence. The reason for the absence is immaterial.[11]

The selection of employees to be randomly tested will be made pursuant to a protocol developed by a statistician and will be computerized. 2,600 of the 4,400 operating employees will be tested for drugs and alcohol

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10. The pay scale will be for the alternative assignment.

11. Testing of "operating employees" who are transferred within SEPTA was also mentioned at the hearings. In October, 1987, TWU filed a second amended complaint claiming damages for employees tested under the return to work provisions of 87-2 and challenging other body fluid testing that occurs without reasonable suspicion. It is agreed that the only issues to be adjudicated here concern random and return to work testing under 87-1 and 87-2.

each year — 33 percent once, 10 percent twice, and two percent more frequently. About 5,400 random breath alcohol tests will also be given. Using this statistical design, each operating employee will be at testing risk every day, although the chances of being tested more than twice a year will be small. The total cost of the program for the first two years will be $3 million and should diminish thereafter.

Operating employees taking prescription medication will be required to obtain approval from SEPTA's medical department before reporting to work. A fitness for duty determination will be made in consultation with the prescribing physician and a medical consultant. The prescription will be confidential information.

As finally revised, the program contemplates establishment of an advisory committee of labor representatives to review the program semi-annually and to consult with SEPTA management as to any important changes—such as enlargement of the class of operating employees, a change in the employee assistance provider or testing analysis laboratory.

The basic design of the program was formulated by a psychologist who is the director of Rutgers University Center of Alcohol Studies. He testified that he successfully developed similar programs for the United States Navy and professional sports. In his opinion, an effective program requires a balanced combination of education, treatment, deterrence and enforcement. The testing is aimed at detecting chronic abusers, not actual impairment. The reason is two-fold: On the one hand, actual impairment is hard to measure using present technology. On the other, if testing were pre-scheduled and announced in advance, many abusers would be able to stay drug-free during the testing period. A positive result establishes relatively recent intake in a pharmacologically active amount. Tr. Sept. 9, 1987, at 21. In his opinion, the testing must be at random, unannounced, and done daily in order to act as an effective deterrent.

Although problems remain[12] with the revised program, it is not so intrusive or unreasonable as to fail to withstand constitutional scrutiny. Given the experience in other settings, the program appears to be logically related to its purposes. After a suitable trial period, improvements can be made and deficiencies can be corrected. Plaintiffs are not foreclosed from instituting a specific challenge at a later date. *See American Federation of Government Employees, AFL-CIO v. Dole,* 670 F.Supp. 445, 449 (D.D.C.1987). By repeated revision of the original program, SEPTA has shown some willingness to accept recommendations and to accommodate other points of view.

With much force, the unions argue that the program is largely experimental; that a less intrusive program could be tried first; that the proposal is a substantial departure in policy that is unlikely to be accepted by SEPTA's already discontented employees; that the program would be much more effective if SEPTA were willing to share control of it with labor; and that rigid administration, as has occurred in the past, will produce arbitrary and unjust results. Making due allowance for that position, the reasons for permitting random testing to proceed are the evidence of a drug problem among SEPTA's employees and the now well recognized presence of substance abuse in our society; the public interest in having a mass transportation system operated as safely and efficiently as practicable; the knowledge of

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12. See Bench Remarks, September 25, 1987. Since then a number of criticisms were rectified, but, in my view, a much better program could have been proposed if SEPTA had abandoned its traditional approach to labor-management issues. The constitutionality of substance testing by a public employer must rest on the public's needs, not the employer's. The best chance of success with such a program is to have the cooperation of labor, which requires that management share—just as a matter of enlightened self-interest—some of its decision-making and administrative powers. This SEPTA has agreed to do only in small measure.

operating employees of the safety critical nature of their jobs; the employees' corresponding diminished expectation of privacy in the performance of their duties; the probable efficacy of the program; the various measures to minimize the intrusiveness of the searches; and SEPTA's testimonial pledge to implement the program fairly and sensitively.

III.

[1] Because it is a state agency and instrumentality, the Fourth Amendment applies to SEPTA, through the Fourteenth Amendment. *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Compulsory urinalysis and chemical breath testing have been held to be searches and seizures within the meaning of the Fourth Amendment. *E.g., National Federation of Federal Employees v. Weinberger,* 818 F.2d 935, 942 (D.C.Cir.1987) (citing cases). To comply constitutionally, searches must be reasonable. *New Jersey v. TLO,* 469 U.S. 325, 337, 105 S.Ct. 733, 741, 83 L.Ed.2d 720 (1985). Although a warrant and probable cause or some quantum of individualized suspicion bear on the reasonableness issue, the Fourth Amendment does not require an irreducible minimum of individualization. *United States v. Martinez-Fuerte,* 428 U.S. 543, 560–61, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976). Sometimes, the balancing of interests attenuates an individualized approach. *E.g., National Treasury Employees Union v. Von Raab,* 816 F.2d 170, 176-77 (5th Cir.1987).

The evidence demonstrates that SEPTA's suspicion-testing program has not been enough to satisfy the needs of public safety and mass transit reliability. In turn, employees in operational positions cannot reasonably expect SEPTA to ignore its responsibility to do all possible to ensure public confidence in its services. *Von Raab,* 816 F.2d at 180; *Shoemaker v. Handel,* 795 F.2d 1136, 1142 (3d Cir.), cert. denied, ____ U.S. ____, 107

S.Ct. 577, 93 L.Ed.2d 580 (1986). In these circumstances, the constitutionality of the program depends on a "balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish,* 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979). *McDonell v. Hunter,* 809 F.2d 1302, 1305 (8th Cir.1987). *See O'Connor v. Ortega,* ____ U.S. ____, 107 S.Ct. 1492, 1501-03, 94 L.Ed.2d 714 (1987) (plurality opinion) (public employers have overriding administrative interest different from law enforcement so that intrusions on privacy of government employees in investigating work related misconduct should be assessed by reasonableness standard and totality of circumstances).

SEPTA's interests in the safety of its passengers and in the public's reposing confidence in its system are of paramount importance. *Division 241, Amalgamated Transit Union v. Suscy,* 538 F.2d 1264, 1267 (7th Cir.) *cert. denied,* 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976). "Government has a vital interest in making certain that its employees, particularly those whose impairment endangers their co-workers or the public, are free of drugs." *Capua v. City of Plainfield,* 643 F.Supp. 1507, 1511 (D.N.J.1986). It is perhaps stronger than New Jersey's interest in "assuring the public of the integrity of the persons engaged in the horse racing industry." *Shoemaker,* 795 F.2d at 1142 (that interest and jockey's reduced expectation of privacy held to justify program of random breath testing and urinalysis). As with all public employers, SEPTA is required by law to administer its work properly and efficiently. *O'Connor,* ____U.S. at ____, 107 S.Ct. at 1501-03.

The well known effects of alcohol and drug abuse, together with the two-year record of positive test results and accidents and injuries since 85–1, sufficiently show that public safety and public confidence problems exist in SEPTA's operations. Although the percentage of

employees who chronically abuse alcohol and drugs may not be large, SEPTA is obligated, legally, ethically and as a matter of good management, to take steps to reduce the problem to a minimum. *Jones v. McKenzie,* 833 F.2d 335, 340 (D.C.Cir.1987). Needless serious personal injuries and deaths caused by alcohol or drug related accidents are the unacceptable alternative. SEPTA must continually explore a variety of programs with its employees and its equipment to improve the safety of its operations. Moreover, SEPTA should be encouraged to take remedial measures and to design new personnel programs if reasonable and minimally intrusive. *See Von Raab,* 816 F.2d at 179 (not unreasonable to address a potential drug problem even in the absence of evidence of prior drug related accidents or individualized suspicion that a particular employee has a drug or alcohol problem). All of SEPTA's operating employees must be acutely aware that the public questions the system's safety and reliability, including the presence of alcohol and drug abuse.

Reliance on suspicion testing appears, therefore, to be inadequate. Many drugs have delayed, residual or chronic effects not ascertainable through behavioral observation. Tr. Feb. 5, 1987, at 311-316. Numerous SEPTA employees operate without close supervision. Even obvious impairment can go undetected. Recurrent notice testing will detect only those who cannot temporarily abstain. Considering our present knowledge and experience, a program of frequent random testing may be the best means of assuring that SEPTA employees will not be impaired and of gaining public acceptance and support. *Shoemaker,* 795 F.2d at 1142. It may be the only way to deal with the problem of substance abuse in a highly regulated and safety critical industry affected with the public interest. *McDonell,* 809 F.2d at 1308.

Drug screening by urinalysis is, concededly, a serious infringement of an individual's reasonable expectation of privacy.[13] As revised, the SEPTA program markedly reduces its intrusiveness. Union consultation is contemplated. Alcohol testing, conducted by breathalyzer, is less intrusive than urinalysis or blood testing. Urinalysis, properly administered, is not as intrusive as a strip search or a blood test. *McDonell,* 809 F.2d at 1308; *Von Raab,* 816 F.2d at 177. Advance notice reduces the intrusive nature of a search. *Weinberger,* 818 F.2d at 943; *Shoemaker,* 795 F.2d at 1142; *Capua,* 643 F.Supp. at 1515 (surprise early morning urinalysis of city fire fighters unconstitutional).[14]

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13. "One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds." *McDonell v. Hunter,* 612 F.Supp. 1122, 1127 (S.D.Iowa 1985), *aff'd as modified,* 809 F.2d 1302 (8th Cir. 1987). Urine testing may disclose whether the employee is under treatment for an illness and the presence of nonprescription substances such as blood. "There are few activities in our society more personal or private than the passing of urine." *Von Raab,* 816 F.2d at 175.

14. A growing number of decisions have concluded that nonsuspicion mandatory urinalysis by a public employer is unconstitutional. *See, e.g., Policemen's Benevolent Assoc., Local 318 v. Township of Washington,* 672 F.Supp. 779 (D.N.J. 1987) (police officers); *Taylor v. O'Grady,* 669 F.Supp. 1422 (N.D.Ill. 1987) (correctional employees); *Feliciano v. City of Cleveland,* 661 F.Supp. 578 (N.D.Ohio 1987) (police academy candidates); *American Federation of Government Employees v. Weinberger,* 651 F.Supp. 726 (S.D.Ga. 1986) (civilian police employed by Department of Defense); *Lovvorn v. City of Chattanooga,* 647 F.Supp. 875 (E.D.Tenn. 1986) (firefighters); *Caruso v. Ward,* 133 Misc.2d 544, 506 N.Y.S.2d 789 (Sup.Ct. 1986), *aff'd,* 131 A.D.2d 214, 520 N.Y.S.2d 551 (App.Div. 1987) (members of organized crime control bureau); *Patchogue-Medford Congress of Teachers v. Board of Education,* 119 A.D.2d 35, 505 N.Y.S.2d 888 (App. Div. 1986), *aff'd,* 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987) (public school teachers). Many of these cases distinguish *Shoemaker* and other nonsuspicion testing decisions based on insufficient showing of need, or of reduced expectations of privacy, or

As noted, collection personnel do not observe the employee during urination, which takes place in a private restroom stall. *See Mullholland v. Department of Army,* 660 F.Supp. 1565, 1569 & 1576 (E.D.Va. 1987). A high degree of confidentiality is to be maintained. "The need for protection against governmental intrusion diminishes if the investigation is neither designed nor likely to be used to bring criminal charges against the person investigated." *Von Raab,* 816 F.2d at 179. *See O'Connor,* ____ U.S. at ____, 107 S.Ct. at 1501; *Shoemaker,* 795 F.2d at 1140 (test results kept confidential from enforcement agencies). There are provisions allowing an employee whose test is positive to challenge the result. *See Banks v. Federal Aviation Admin.,* 687 F.2d 92, 95 (5th Cir.1982). The detailed chain of custody provisions virtually eliminate the possibility that a sample will be incorrectly identified. *Rushton v. Nebraska Public Power Dist.,* 653 F.Supp. 1510, 1526 (D.Neb. 1987).

The program contains a strong rehabilitative component, and an ameliorative distinction is made between a voluntary self-referral and an employee whose unfitness is raised by a test result. Though the incidence of testing may be unduly large, the protocol was intended to maximize its deterrent value, an essential part of the integrated program. Tr. Feb. 5, 1987, at 284. *Von Raab,* 816 F.2d at 180. With time, its volume can be reduced. Morcover, the plan approved by this Circuit, in *Shoemaker,* authorized the testing of the same jockey three times in one week. *Shoemaker,* 795 F.2d at 1140. Here, by comparison, only two percent of the operating employees will be tested more than twice a year.

NOTES *(Continued)*

because of a high degree of intrusiveness. None involves a work environment as demonstrably safety sensitive as SEPTA's, compelling evidence of a current drug and alcohol problem unlikely to be solved by less aggressive measures, and a program as carefully drawn as SEPTA's.

The random screening protocol assures that selection for testing is at random and eliminates any exercise of discretion by SEPTA management. Specific and definite standards for determining a positive test result are set forth, and the testing is to be conducted by an accredited independent laboratory. Specific procedures for sample collection are included in the program. These safeguards are sufficient to protect the employees' reasonable expectations of privacy from the exercise of discretion by SEPTA management in deciding of whom, when and in what manner to conduct the search. *Delaware v. Prouse,* 440 U.S. 648, 655 & 663, 99 S.Ct. 1391, 1396-97 & 1401, 59 L.Ed.2d 660 (1979); *Von Raab,* 816 F.2d at 177; *Shoemaker,* 795 F.2d at 1143.

[2] However, the considerations that justify random testing in an integrated program do not pertain to return to work testing. That aspect of SEPTA's proposal is unwarranted constitutionally absent some reasonable suspicion or programmatic basis. With random testing in place, the need for return to work testing would substantially be eliminated. Employees who return to work will immediately be subject to daily random testing. The physical examination conducted upon return to work should be sufficient to identify employees clearly not fit for duty. SEPTA has not met its burden of justifying return to work as an occasion for testing. *Weinberger,* 818 F.2d at 943 (citing *TLO,* 469 U.S. at 341-42, 105 S.Ct. at 743-44.) The indiscriminate scope of this policy includes those who have been ill, on leave of absence — or any employee who has not been at work for 30 days. There was no evidence suggesting that return to work testing was an integral part of the revised program.

IV.

[3] The collective bargaining relationships that exist between SEPTA and the railroad unions are governed

by the Railway Labor Act. 45 U.S.C.A. § 151 *et seq.* "In general, if a proposed practice by a rail carrier is a clear departure from the collective-bargaining agreement, a dispute over the practice is treated as a major dispute under the Railway Labor Act, and the carrier may not proceed without first negotiating with the employee's representative." *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.,* 802 F.2d 1016, 1017 (8th Cir. 1986).

Under the collective bargaining agreements in effect when SEPTA issued 87-1,[15] an employee's use or possession of drugs and alcohol on the job was prohibited. Those suspected of drug use were subject to urine testing. *See supra* note 4 (Rule I and Rule 100I-A2). Under 85-1, off-duty employees who were subject to duty and suspected of being under the influence could be tested. *See supra* page 545. In addition, body fluid testing occurred upon signal rule violations and upon employee transfers or promotions to safety important jobs. Random testing did not take place. There is no evidence that the unions agreed to or acquiesced in widespread testing or to any significant testing without individualized suspicion.

The unions' acquiescence in suspicion-based, post-violation, transfer and promotion testing cannot be interpreted as an authorization or even foreshadowing of 87-1. *Brotherhood of Maintenance of Way Employees, Lodge 16,* 802 F.2d at 1023. Only "long standing practices" can be considered part of a collective bargaining agreement in determining whether a proposed change is "arguably justified" by the parties' agreement. *Switchmen's Union v. Southern Pacific Co.,* 398 F.2d 443, 447 (9th Cir. 1968).

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15. Return to work testing would also appear to be covered by the "major dispute" rule, but this issue is not dealt with in view of the determination that such testing is constitutionally impermissible.

SEPTA proposes to test 45 percent of its operating employees at least once each year. The incidence, focus, rationale for, and employee impact of such testing is substantially different from 85-1, and it obviously will affect the working relationship of the parties. The proposal cannot be "arguably justified" by the terms of prior agreements or the parties' prior practice. The unions are correct that the proposed program constitutes a "major dispute," precipitating the notice and administrative requirements of 45 U.S.C.A. § 156. *Brotherhood of Locomotive Eng'rs. v. Burlington Northern R.R.*, 620 F.Supp. 163, 170-172 (D.Mont. 1985), *appeal pending*, No. 85-4138 (9th Cir. argued July 8, 1986). *See Railway Labor Executives v. Norfolk & Western Ry.*, 833 F.2d 700, 707 n. 6 (7th Cir. 1987). The status quo rule of Section 156, which is the centerpiece of the Act, is intended to encourage resolution through mediation and, if necessary, arbitration. *Detroit & Toledo Shoreline R.R. v. United Transp. Union*, 396 U.S. 12, 148-51, 90 S.Ct. 294, 298-99, 24 L.Ed.2d 325 (1969). *See Brotherhood of Maintenance of Way Employees, Lodge 16*, 802 F.2d at 1021.

The railway unions, for these reasons, are entitled to an injunction preserving the status quo.

V.

[4] Local 1594 of the UTU represents the bus and trolley operators of SEPTA's Red Arrow division under the Pennsylvania Public Employe Relations Act, 43 P.S. § 1101 *et seq.* Under 43 P.S. § 1101.701, public employers must bargain in good faith with the representative of their employees over wages, hours and other terms and conditions of employment. Local 1594 requests an injunction requiring SEPTA to fulfill that statutory duty before implementing the program. However, a failure to bargain in good faith is an unfair labor practice under 43 P.S. § 1101.1201. Under 43 P.S. § 1101.1301, exclusive

jurisdiction to prevent unfair labor practices is given to the Pennsylvania Labor Relations Board. *See Philadelphia Federation of Teachers v. Board of Education,* 24 Pa.D. & C.3d 211, 214-15 (1981). Federal courts lack subject matter jurisdiction over unfair labor practice claims that come within the board's jurisdictional purview. *Sellers v. Local 1598, Dist. Council 88, AFSCME,* 600 F.Supp. 1205, 1212-13 (E.D.Pa. 1984), *aff'd,* 810 F.2d 1164 (3d Cir. 1987). Local 1594's request for injunctive relief must be denied for lack of jurisdiction.

An order follows.

ORDER

AND NOW, this 19th day of January, 1988 it is ordered:

1. The preliminary injunction entered February 9, 1987 is dissolved.

2. The request of plaintiffs Transport Workers' Union of Philadelphia, Local 234 and Transport Workers' Union of America, Local 2013 for a permanent injunction of SEPTA order no. 87-1, as revised, is denied, subject to the following:

   a. "Operating Employees" shall not include "Conductors and Passenger Attendants" unless it is established that these are safety sensitive positions.

   b. SEPTA order no. 87-1, as finally revised, shall be submitted to this court for review before it is promulgated, and random testing shall not be begun until after court review occurs.

   c. This court shall retain jurisdiction to supervise the implementation of 87-1.

3. The request of all plaintiffs for a permanent injunction of SEPTA order no. 87-2 is granted.

4. The request of the Railroad Brotherhood plaintiffs for a permanent injunction of SEPTA order no. 87-1, as finally revised, is granted until such time as SEPTA complies with Section 156 of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*

5. The request of the plaintiff Local 1594 of the United Transportation Union for a permanent injunction of SEPTA orders nos. 87-1 and 87-2 because of SEPTA's alleged noncompliance with the Pennsylvania Public Employe Relations Act is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRANSPORT WORKERS' UNION OF PHILADELPHIA, LOCAL 234	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0389
TRANSPORT WORKERS' UNION OF AMERICA LOCAL 2013	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0446
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, DIVISION 71, et al	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, et al	:	NO. 87-0448
UNITED TRANSPORTATION UNION, et al	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0455

ORDER

AND NOW, this 19th day of February, 1988, it is hereby ordered and decreed that Southeastern Pennsylvania Transportation Authority ("SEPTA") may promulgate its Integrated Program of Education, Assistance, and Testing for Intoxicants and Controlled Substances – As Revised (and as further modified and submitted to the Court for review on January 28, 1988) ("Integrated Program"). It is hereby further ordered and decreed that SEPTA may begin random testing under the Integrated Program upon accomplishing the following steps:

1. Notification of all affected employees of the existence of the Integrated Program.

2. Constituting the Advisory Committee.

3. Meeting with the Advisory Committee concerning the selection of the Employe Assistance Program Referral Agency and Providers.

4. Implementation of the Revised Employe Assistance Program (which implementation shall precede the implementation of random testing by at least 10 days).

SEPTA shall notify plaintiffs at the time of accomplishing each of these steps.

/s/ E. LUDWIG

Edmund V. Ludwig, *J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRANSPORT WORKERS' UNION OF PHILADELPHIA, LOCAL 234	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0389
TRANSPORT WORKERS' UNION OF AMERICA LOCAL 2013	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0446
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, DIVISION 71, et al	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0448
UNITED TRANSPORTATION UNION, et al.	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0455

ORDER

AND NOW, this ____day of February, 1988, it is hereby ordered and decreed that the Motion of Southeastern Pennsylvania Transportation Authority To Alter Or Amend Judgment And To Amend Findings Of Fact is hereby granted. Paragraph 3 of the Order entered by the Court on January 20, 1988 is hereby deleted, for the reasons set forth in the revised Memorandum issued this date.

BY THE COURT:

/s/ Denied – E. LUDWIG

J.

Entered: 3-1-88
ORDER OF COURT

STATUTORY PROVISIONS OF THE RAILWAY LABOR ACT

§152. General duties

First duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives. Representatives, for the purpose of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act [enacted May 20, 1926], then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act [45 USCS§156].

Eighth. Notices of manner of settlement of disputes; posting. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall

be held binding upon the parties, regardless of any other express or implied agreements between them.

[The remining paragraphs of §152 are omitted].

§153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act [enacted June 21, 1934], and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act [45 USCS §§151a, 152].

(b) The carriers, acting each through its boards of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or

association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fails to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act [enacted June 21, 1934], in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly

qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof [45 USCS §§151a, 152] and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors,

trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof [45 USCS §§151a, 152] and which represent employees in engine, train, yard, or hostling service; Provided, however, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: Provided further, however, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal

men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted June 21, 1934], shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the

Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be

final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the

district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the

findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code [28 USCS §§1254, 1291].

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after the approval of this Act [enacted June 21, 1934] and adopt such rules as it deems

necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: Provided, however, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional

boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph *(l)* hereof, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of

employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members

of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day, named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

§155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or whether conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act [45 USCS §160]) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act [45 USCS §160], no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

[The remaining paragraphs of §155 are omitted].

§156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of

the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act [45 USCS §155], by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

MOTION FILED
MAR 28

No. 88-1486 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *et al.*
Petitioners,

v.

TRANSPORT WORKERS' UNION OF PHILADELPHIA, LOCAL 234, *et al.*
Respondents.

MOTION TO WITHDRAW IN PART PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: March 28, 1989

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No. 88-1486

IN THE

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MOTION TO WITHDRAW IN PART PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Southeastern Pennsylvania Transportation Authority, by its counsel of record, moves for leave to withdraw the second of the "Questions Presented" and Section II of the Reasons For Granting The Writ contained in its Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit filed March 8, 1989, and in support thereof states as follows:

1. The Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit (the Petition) presented two questions. The first question raised an issue under the Railway Labor Act, 45 U.S.C. §151 et. seq; the second question raised an issue under the Fourth Amendment to the United States Constitution as applied to states under the Fourteenth Amendment to the United States Constitution.

2. Since the filing of the Petition, Southeastern Pennsylvania Transportation Authority (SEPTA) and respondent Transport Workers' Union of Philadelphia, Local 234 (TWU) have reached agreement on a new collective bargaining contract which includes an amicable resolution of the return to work drug and alcohol testing controversy embodied in the second of the "Questions Presented."

3. The agreement requires SEPTA to move for withdrawal of the second question presented relating to return to work drug and alcohol testing.

WHEREFORE, SEPTA respectfully requests that the second question presented and Section II of the Reasons For Granting The Writ be deemed withdrawn from the Petition and that there remain for consideration by the Court only the first question presented relating to the status of fitness for duty random drug and alcohol testing under the Railway Labor Act, 45 U.S.C. §151 et seq.

Respectfully submitted,

DILWORTH, PAXSON, KALISH
& KAUFFMAN

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Dated: March 28, 1989

CERTIFICATE OF SERVICE

I, JOHN F. SMITH, III, a member of the Bar of this Court, hereby certify that on this 28th day of March, 1989, three copies of a Motion to Withdraw in Part Petition For a Writ of Certiorari in the above entitled case were mailed, first class postage prepaid, to the following counsel for all the respondents herein:

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I further certify that all parties required to be served have been served.

/s/ John F. Smith, III
John F. Smith, III

Dated: March 28, 1989

No. 88-1486

(3)

Supreme Court, U.S.
FILED
APR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *et al.*,

Petitioners,

v.

TRANSPORT WORKERS' UNION OF PHILADELPHIA, LOCAL 234, *et al.*,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS BROTHERHOOD OF LOCOMOTIVE ENGINEERS, DIVISION 71; THOMAS C. BRENNAN; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; UNITED TRANSPORTATION UNION; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; AND BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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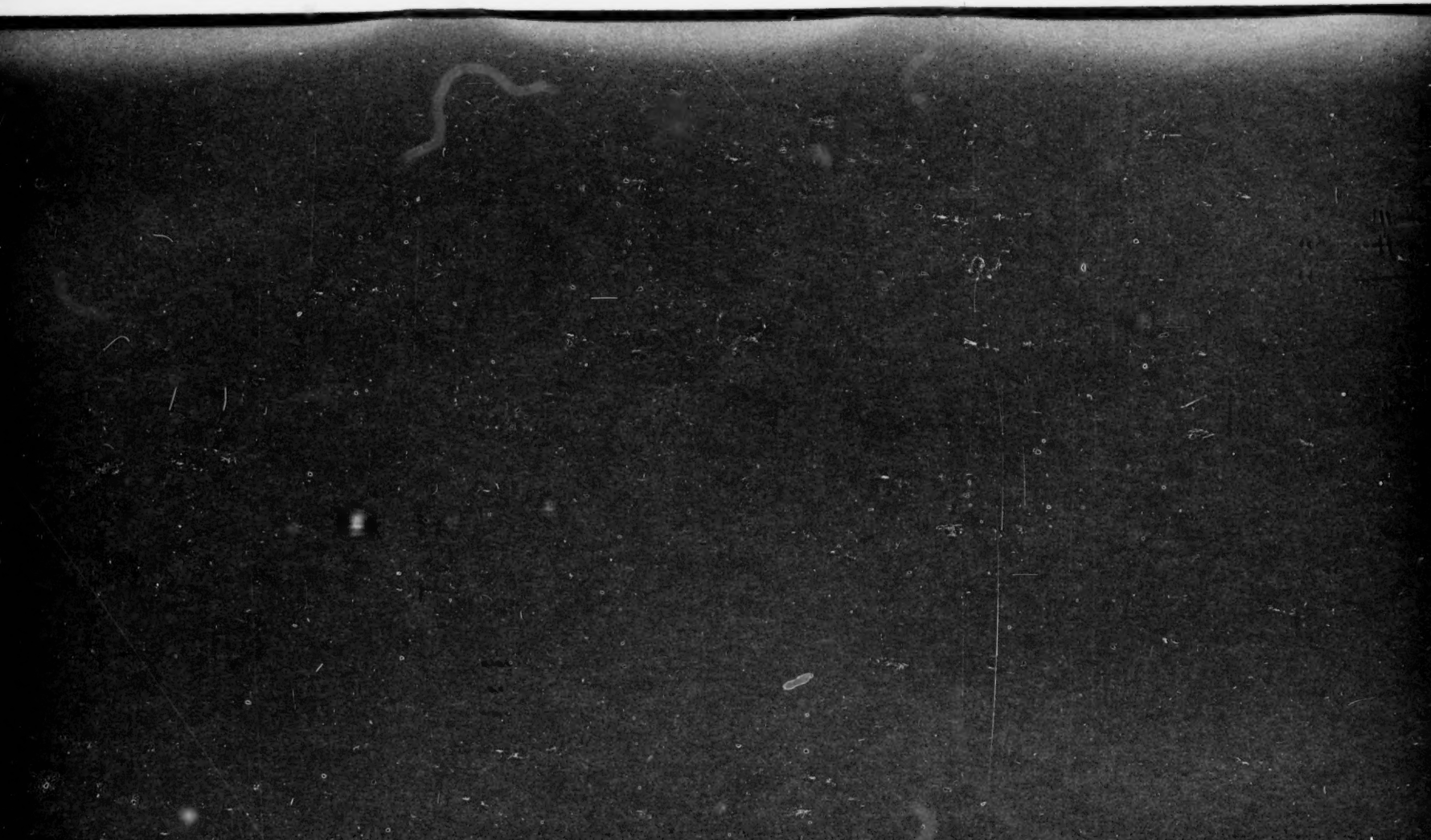
(C) 302



QUESTION PRESENTED

Whether the court of appeals correctly held that a rail carrier violates the major dispute provisions of the Railway Labor Act by unilaterally instituting random drug and alcohol testing of its employees, when the bargaining agreement is silent on the subject and the program differs significantly from past practice.

PARTIES BELOW

Respondent Brotherhood of Locomotive Engineers is the bargaining representative for the craft of locomotive engineers employed by the petitioner Southeastern Pennsylvania Transportation Authority ("SEPTA"). Respondent United Transportation Union is bargaining representative for the crafts of operating employees (other than locomotive engineers) on SEPTA. Respondent Transportation Communications International Union (formerly Brotherhood of Railway, Airline and Steamship Clerks) represents the craft of clerical employees employed by SEPTA; and the respondent Brotherhood of Maintenance of Way Employes is the collective bargaining representative for the craft of maintenance of way employees working for SEPTA. The respondents, none of which are corporations, were the plaintiffs in the district court.

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No. 88-1486

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BRIEF IN OPPOSITION FOR RESPONDENTS BROTHERHOOD OF LOCOMOTIVE ENGINEERS, DIVISION 71; THOMAS C. BRENNAN; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; UNITED TRANSPORTATION UNION; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; AND BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

STATEMENT OF THE CASE

As the Court recently discerned in *Skinner v. Railway Labor Executives' Ass'n*, 57 *U.S.L.W.* 4324 (U.S. March 21, 1989), for almost a century, railroad employees have been required to comply with "Rule G," which forbids reporting to work under the influence of and on-the-job use or

possession of alcohol and drugs. On Southeastern Pennsylvania Transportation Authority ("SEPTA"), Rule G reads:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited
>
> Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties J.A. III, 1028a.[1]

However, over those same years throughout the railroad industry, including on SEPTA and Consolidated Rail Corporation ("Conrail"), which handled the involved rail operations prior to SEPTA, the method for detection of Rule G violations was not set forth in any agreement. SEPTA has not disputed this fact. *E.g.*, JA I, 224a-225a; 249a-251a; 255a-256a. Rather, by decades of past practice, a mutually accepted method of detection and enforcement evolved in which employees exhibiting outward manifestations of a drugged or intoxicated state, *i.e.*, visual evidences of unusual behavior or behavior associated with drug or alcohol use, were charged with Rule G violations. JA I, 225a; 250a-251a; 256a; 258a-259a; 264a-265a. As one witness testified as to the method for Rule G enforcement: "Visual observation by supervisors of an individual who may have been impaired; questioning of that individual; examination of his physical demeanor; and, if it was determined that he was under the influence, he was removed from service." JA I, 246a.

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[1] References herein to "J.A." are to the three volume Joint Appendix filed in the court of appeals. Those citations to "Pet. App." are to the appendix accompanying the petition, and reference to "Resp. App." are to the appendix to this brief.

SEPTA, which provides commuter transportation services in the five county Philadelphia metropolitan area, began operating commuter rail service through its Regional Rail Division with its own employees on January 1, 1983, when those functions were taken away from Conrail by the Northeast Rail Services Act of 1981, 45 U.S.C. §744(a). JA I, 76a; 78a; 82a. The labor relations of SEPTA's Rail Division are governed by the Railway Labor Act ("RLA"), 45 U.S.C. §§151 *et seq*. Pursuant to the RLA, SEPTA's locomotive engineers are represented by respondent Brotherhood of Locomotive Engineers ("BLE"), its operating employees (other than locomotive engineers) by respondent United Transportation Union ("UTU"), its clerical, office, station and telegraphic (block operators) employees by the Transportation Communications International Union ("TCU"), and its maintenance of way employees by the Brotherhood of Maintenance of Way Employes ("BMWE"). JA I, 73a-75a.

Following the assumption of the commuter rail service by SEPTA, the respondent rail unions individually sought to foster alcohol and drug prevention programs based upon equitable, humane principles, including rehabilitation or employee assistance plans, along with identification and intervention plans drawn on the lines of the Union Pacific program and CSX Transportation's medical mode program, all of which were designed to treat with the problem efficiently and effectively. JA I, 228a; 254a; 260a; JA III, 1232a-76a. Joining another group of railroads, like Conrail and Burlington Northern, SEPTA repelled all of these efforts. It adamantly opposed any program with labor participation and employee assistance, even though its own expert at trial, Dr. Robert J.

Pandina, testified "absolutely" in response to the question as to whether "one of the major ingredients in having a good drug and alcohol program with any employer is a cooperative program between labor and management," and also agreed that negotiated programs are "most desirable." *See* Resp. App. 1a-5a.

Contrary to the picture SEPTA portrays, this attitude and approach extended throughout the entire proceeding and was recognized by the trial judge, who stated in his opinion on permanent injunction:

> . . . [I]n my view, a much better program could have been proposed if SEPTA had abandoned its traditional approach to labor-management issues. . . . The best chance of success with such a program is to have the cooperation of labor, which requires that management share – just as a matter of enlightened self-interest – some of its decision-making and administrative powers. This SEPTA has agreed to do only in small measure.

Pet. App. A43, at n. 12.[2]

After SEPTA took over rail operations, it made a minor modification in the Rule G policy. On July 1, 1983, it issued Rule I, which extended Rule G to "[t]hose suspected of drug use." JA II, 988a.

---

[2] Not only the Union Pacific and CSX examples, but the fact that the Brotherhood of Railroad Signalmen and Transport Workers' Union of Philadelphia, as established by SEPTA's Motion to Withdraw filed on March 28, 1989, reached agreements respecting testing with SEPTA after the issuance of U.S. District Judge Ludwig's opinion establishes that the subject is amenable to collective bargaining.

On August 2, 1985, the Federal Railroad Administration ("FRA") issued its Final Rules for Control of Alcohol and Drug Use in Railroad Operations, 49 C.F.R. §219.1 *et seq.*, which respondents objected to and were approved by this Court in *Skinner, supra*. These rules apply to SEPTA and provide for body fluid testing based upon "a reasonable suspicion that the employee is currently under the influence of or impaired by" alcohol or drugs, or following accidents, specified rule violations, and incidental human factors. JA I, 163a. Pursuant to these rules, SEPTA issued orders Nos. 85-1 and 85-2 on September 20, 1985. Neither order gave any indication that SEPTA would engage in random testing. Order No. 85-1 provides compliance with §219.9(a)(1), (2) and §219.101 of the FRA regulations, which require a railroad to "exercise due diligence" to ensure that no employee "use or possess alcohol or any controlled substance," or be under the influence of or impaired by alcohol or any controlled substance, while assigned, reporting for or going on duty, or remaining on duty. JA I, 159a; 160a. Order No. 85-2 is a four sentence document suggesting SEPTA will permit a "troubled employee" a one-time unpaid leave of absence for voluntary referral to treatment. JA I, 171a. The order was summarily adopted to fulfill the requirements, in SEPTA's judgment, of §219.401(b) of the FRA regulations, which states that "each railroad shall adopt, publish and implement (1) a policy designed to encourage and facilitate the identification of those covered employees who abuse alcohol or drugs as a part of a treatable condition and to ensure that such employees are provided the opportunity to obtain counseling or treatment before

those problems manifest themselves in detected violations of this part (hereafter 'voluntary referral policy'). . . ." JA I, 165a. Also, in conformity with 49 C.F.R. §219.301, on October 27, 1985, SEPTA issued Regional Rail Division Special Instruction 1001-A2 that informs the rail employees that they might have to provide a urine sample "after certain accidents and incidents or at any time the company reasonably suspects you are under the influence of, or impaired by, drugs while on duty." JA I, 82a.

Along the same lines, on July 24, 1986, SEPTA issued District Notice No. 3-26 providing that "any signal violation will result in body fluid testing," in order to comply with §219.301(b) and (c) of the FRA regulations, which require such testing for "operating rule violations or errors," including "signal violations." JA I, 163a; 1033a.

None of these publications related to or prescribed random mandatory testing. As always in the past, any testing came into play only after a purported basis for "reasonable cause" or "reasonable suspicion" arose to believe the employee could be under the influence of or impaired by the use of drugs and alcohol. The test did not become a method of detection, but a method for substantiating or refuting the "reasonable suspicion" basis for charging the individual for improper alcohol and drug use. Though the organizations did not complain in writing as to each of these steps taken by SEPTA – public objection would have been considered tantamount to sanctioning drug and alcohol use and eliminating a purported deterrent to abhorrent behavior and, in any event, most all the changes were based upon the *FRA* regulations – they did collectively bring the litigation

challenging those regulations; and, as previously described, the organizations cajoled, complained and sought to negotiate on complete and extensive testing and treatment plans and refused to vacate to the company the right to unilateral creation and development of mandatory testing and assistance programs, or to testing without some type or form of particularized suspicion or detection.

In fact, all testimony at trial established, and both the trial court and court of appeals so found (Pet. App., A28, A50), that since SEPTA assumed rail operations, it had not given random drug screens to the employees represented by respondent unions. Never prior to January 21, 1987, had SEPTA selected employees "by lot for the purpose of taking urine and blood specimens for determination of alcohol or drug use." JA I, 115a; 247a-248a; 250a; 252a; 258a-259a. In fact, clerical employees, including tower operators, were never subjected to testing until the January 23, 1987 promulgation of SEPTA's random testing policy established by Order No. 87-1. JA I, 265a.

At a news conference held on January 16, 1987, without even prior announcement to its unions, SEPTA informed the public of its intent to inaugurate a random drug and alcohol testing program for its employees represented by respondents. JA I, 83a. On January 21, 1987, SEPTA issued Order No. 87-1, a one-page document, telling its operating employees that they would be subject to urine and/or blood screening tests which would be given without advance notice. *Id.;* JA I, 175a. Failure to provide urine/blood samples would subject the employee to dismissal. JA II, 931a-933a.

On January 23, 1987, SEPTA notified eleven employees that they were required to have their urine tested pursuant to Order No. 87-1. JA I, 84a. Of these eleven, five were members of UTU, four were members of BLE, and one was a member of TCU. Followed by television cameras and members of the media, the eleven employees provided urine samples in locations near their work stations. JA I, 84a. All tested negative JA I, 86a.

On January 26, 1987, BLE, its Division 71, and Thomas C. Brennan, a SEPTA engineer and local chairman of Division 71, filed a complaint alleging constitutional violations and also that SEPTA had violated Section 6 of the RLA, 45 U.S.C. §156, by unilaterally establishing the random drug screening policy without first serving notice and exhausting the procedures set forth in the RLA. JA I, 31a-50a. The following day a similar complaint was filed by UTU, TCU and BMWE. JA I, 51a-57a.

On February 9, 1987, the district court issued a bench opinion and on February 19, 1987, entered an order preliminarily enjoining SEPTA from implementing its program of random testing as then constituted. JA I, 449a-460a. The trial court directed SEPTA to prepare a revised program. *Ibid.* SEPTA's response on February 12, 1987 was to post Order No. 87-2, its return-to-work testing policy, which was enjoined by the courts below and is the subject of SEPTA's motion filed on March 28, 1989 to withdraw that matter from its Petition.

After trial on the permanent injunction, the district court entered a memorandum approving the constitutionality of the random testing program. Pet. App. A52.

As to the employees covered by the RLA, the court granted an injunction preserving the status quo "until such time as SEPTA complies with Section 156 of the Railway Labor Act, 45 U.S.C. §151 *et seq.*" Pet. App. A53. To the railroad's assertion that the case only involved an interpretation of the existing labor contract and the unions' failure to sue it upon any of the changes from July 1, 1983 to the inauguration of random testing constituted authorization of the testing or, at least, established a minor dispute as to the meaning of the written agreement and past practices, the district court rejected same and stated:

> The unions' acquiescence in suspicion-based, post-violation, transfer and promotion testing cannot be interpreted as an authorization or even foreshadowing of 87-1. *Brotherhood of Maintenance of Way Employees, Lodge 16*, 808 F.2d at 1023. Only "long standing practices" can be considered part of a collective bargaining agreement in determining whether a proposed change is "arguably justified" by the parties' agreement. *Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968).
>
> * * *
>
> The program cannot be "arguably justified" by the terms of prior agreements or the parties' prior practice. The unions are correct that the proposed program constitutes a "major dispute," precipitating the notice and admininstrative requirements of 45 U.S.C.A. §156. *Brotherhood of Locomotive Eng'rs. v. Burlington Northern R.R.*, 620 F. Supp. 163, 170-172 (D. Mont. 1985), *appeal pending*, No. 85-4138 (9th Cir. argued July 8, 1986). *See Railway Labor Executives v. Norfolk & Western Ry.*, 833 F.2d 700, 707 n.6 (7th Cir. 1987). The status quo role of Section 156, which is the

> centerpiece of the Act, is intended to encourage resolution through mediation and, if necessary, arbitration. . . .

Pet. App. A50-A51.

The Third Circuit upheld this determination. The decision that the dispute was a major one subject to negotiation was based, first, on that court's decision in *Railway Labor Executives' Ass'n v. Conrail ("Conrail")*, 845 F.2d 1187 (3d Cir. 1988), *cert. granted*, 109 S. Ct. 52 (1988) (argued Feb. 28, 1989). In *Conrail*, the Third Circuit applied the traditional "arguably justified" standard for determining the type of dispute – major or minor – before the court. Thus, the court of appeals said: "A labor dispute over implementation of a drug testing program that "can 'arguably' be justified by the existing agreement," or " 'from habit and custom,' is classifiable as a minor one and the proposed change may be implemented unilaterally." Pet. App. A26. However, "SEPTA's institution of random drug testing differs significantly from prior practice," and did not permit a construction of being a minor dispute subject to arbitration. *Ibid.* Moreover, SEPTA's argument that the railway unions' acquiescence in other forms of testing was found to "ignore[] the significant difference between drug testing predicated on requests for transfer or promotion, which carries an element of voluntariness" and "testing on the basis of reasonable suspicion of drug use bears an element of 'cause' not present in the case of random testing." Pet. App. A27-A28. And the court of appeals found ample support in the record for the district court's finding that there was " 'no evidence that the unions agreed to or acquiesced in widespread testing or to any significant testing without

individualized suspicion.' 678 F. Supp. at 551." Pet. App. A28. Thoroughly analyzing the extensive trial record before it, the lower court concluded in a unanimous opinion:

> SEPTA's addition of broad random testing to its previous policies thus constitutes a major dispute for the purposes of the RLA, and the district court rightfully enjoined SEPTA from implementing random testing of employees covered by the RLA pending exhaustion of the mediation and conciliation procedures required under that Act.

Pet. App. A28-A29.

REASONS FOR DENYING THE WRIT

I.

THE DECISION IS CONSISTENT WITH THE HOLDINGS OF THIS COURT

In part, the court of appeals affirmed the judgment of the district court on the basis of its own prior opinion in the *Conrail* case. In *Conrail,* the Third Circuit held that the unilateral addition of a drug screen to employee medical examinations gave rise, under the facts of that case, to a major dispute under the RLA. The district court had found the dispute to be a minor one on the basis of being "arguably justified under the terms of the parties' long-standing medical policy." The court of appeals reversed, because, in its opinion, it was not "plausible to believe that there was in fact a meeting of the parties' minds on the general issue." 845 F.2d *supra* at 1193. Before this Court, Conrail has urged that the dispute is factually a minor one because it has acquired by past practice the implied contractual right to implement the new rules and

working conditions relative to medical examinations. It has asserted that under those conditions, the Third Circuit failed to apply its own "arguably justified" standard. The railway unions, however, in that case have argued that a carrier does not have any such contractual right to make such unilateral changes, unless the carrier can establish that it has a clear and patent contractual right to make those changes.

Obviously, if the Court affirms the decision in *Conrail*, there would be no reason whatsoever to grant the petition in this case. However, we submit that even if the Court did set aside the Third Circuit's decision therein, it should not follow that the judgment in this case should receive the same treatment.

Insofar as the RLA is concerned, this case involves no question of law that is novel or worthy of review. This Court has fully defined the standards for determining "major" and "minor" disputes. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1944). In *Detroit & Toledo S.L. R.R. v. United Transportation Union*, 396 U.S. 142 (1969), the Court held that unilateral changes by a carrier in major working conditions without first serving a Section 6 notice and thereafter exhausting the negotiation procedures of the RLA was a major dispute and violated Sections 2, Seventh and 6, 45 U.S.C. §§152, Seventh and 156.

The Court held that the RLA's status quo requirement is central to its design. *Id.*, 150. The purpose of this requirement is to prevent the employees from striking and a carrier from doing anything that would justify a strike, for the "heart of the Railway Labor Act" is the

duty to make every effort to reach consensual solutions to disputes in the workplace. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

Therefore, in *Shore Line*, the Court held that the carrier's actions warranted dismissal of its complaint for a strike injunction and a grant of relief to the employees enjoining the railroad's unilateral actions. The status quo to be preserved until the RLA's procedures are invoked and exhausted, the Court said, "are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing agreement." 396 U.S. *supra*, at 143.

From these decisions of this Court, the courts of appeals developed a well-established, uniform test for deciding whether a set of facts constitutes a major or minor dispute. *See, e.g., United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542, at 544 n. 5 (3d Cir. 1974). This test requires an overview as to whether existing collective bargaining provisions "arguably justify" the carrier's unilateral action or are "reasonably susceptible" of the interpretation advanced by the carrier.

The court below correctly set forth the legal standards for determination of this dispute. Contrary to SEPTA's contentions, this case, therefore, only involves the question of whether the courts below correctly canvassed the record. Both the trial court and court of appeals held that the facts of the case established a major dispute between the parties arising from an attempt by the carrier to insert a new provision in the collective bargaining agreement through establishing a new method

for enforcement of Rule G – mandatory random testing without any particularized or generalized suspicion. Whether the courts below were right in the decision, and we submit they were, does not present a question deserving review by the Court.

Further, just as obviously an affirmance in *Conrail* would require the same result in this case, it necessarily follows that adoption of the clear and patent test asserted by the respondent unions in *Conrail* would clearly require a ruling here that the district court had jurisdiction to issue the status quo injunction, because SEPTA has never established a clear and patent contractual right to make the changes it seeks here.

Rather, the reverse has been true. On SEPTA and its predecessor, violations of Rule G have been detected and enforced through sensory surveillance. The bargaining agreement is silent on Rule G and does not expressly or implicitly refer to that rule or to its enforcement. Any testing that has come into play has been based upon particularized suspicion that the individual was under the influence of alcohol or drugs or upon FRA authorization. SEPTA never tested by lot or without individualized suspicion. Thus, when it began mandatory random testing, it was giving itself a right that it had never previously exercised or been granted. These actions of SEPTA sought rights for the future as to entire classes or crafts of employees – the typical major dispute. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, at 723 (1944).

The court of appeals correctly rejected SEPTA's attempt to change its existing legal obligations in the basic employment relationships with its rail employees,

changes by which their jobs are affected, without compliance with the major disputes procedures set forth in the RLA. In *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), this Court rejected a similar railroad contention that a union's attempt to secure a new provision going to the heart of employment, job security, was not negotiable and that the controversy was a minor one. In reply to the traditional argument of carriers, the Court stated:

> . . . [I]t is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of that agreement.

Id., at 341. Here, SEPTA had no clear and patent right to institute a mandatory random testing program, and the courts below, under any formulation of the standard to determine major-minor disputes, correctly found the dispute between the parties to be a major one.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Petitioner appears to contend that the decision below should be judged by different standards as to major-minor due to "[t]he enormity of the problem facing this country because of drug use." Pet. 19. Caught up with the current vogue of more and more testing to eliminate alcohol abuse and drug use, SEPTA seeks a ruling that conditions demand the immediate institution of mandatory testing programs and railroads, therefore, should be encouraged to bypass RLA bargaining procedures for the

time being, that is, until the termination of the current labor contract. Pet. 21. In essence, SEPTA is raising, on the one hand, a complaint about the RLA and the bargaining process required by that Act and on the other hand, a political complaint that legislation should be adopted allowing railroads to engage in extensive random testing. Those complaints should be directed to Congress, which has had legislation before it to remove this item from the bargaining table.

Apparently, in light of the enormity of the problem as advanced by SEPTA, the decision below is claimed to conflict in principle with two decisions, the Seventh Circuit's decision in *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987), and the Eighth Circuit's decision in *Brotherhood of Maintenance of Way Employes, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986), because those cases recognize the needed refinement in testing in order to have an adequate and profound impact on the problem of alcohol and drug use.

SEPTA goes too far. Neither the Seventh nor the Eighth Circuit had before it compulsory random testing. In fact, SEPTA concedes that "both the Seventh and Eighth Circuits in the foregoing decisions inferentially expressed skepticism as to whether the implementation of random testing would present only a minor dispute." Pet. 17, at n. 11. Moreover, SEPTA misreads the decision of the Eighth Circuit, for all that the decision in *Brotherhood of Maintenance of Way Employes v. Burlington Northern*, 802 F.2d 1016, establishes is that in canvassing that record as to the past practices between that union and that carrier, the court found the changes were minor and

the railroad had stayed "within the boundaries of this understanding" and had not "depart[ed] from these established practices in such a substantial way as to abrogate the implied contractual term which they represent." *Id.*, at 1022. Based upon the findings and the legal conclusions concerning the agreement's scope, the Eighth Circuit held that post-incident and post-furlough testing were minor. As the decision is based upon the court's canvassing of the record and does not involve random testing, the decision is not in conflict in any manner with the decision below.

In a subsequent decision, the Eighth Circuit distinguished its earlier opinion. In *Brotherhood of Maintenance of Way Employes v. Chicago and North Western Transportation Co.*, 827 F.2d 330 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1291 (1988), that court of appeals refused to accept an argument similar to SEPTA's which was advanced by the carrier in that case. Comparing the pre-amendment and post-amendment versions of the parties' agreement, the court concluded:

> Common sense and this Court's prior cases indicate that there are limits on the extent to which the CNW may amend Rule G consistent with the history and acquiescence of the parties in past amendments. In this light we agree with the district court that the agreement of the parties (including any terms necessarily implied as a result of established past practices and working conditions) is not reasonably susceptible to the CNW's proposed interpretation whereby it has the right to unilaterally extend its operating rules to regulate off duty use, possession, or sale of illegal drugs in the manner contemplated by Rule G.[5]

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[5] The CNW additionally contends that because it has retained the right to unilaterally amend Rule G since its inception, the status quo imposed pursuant to 45 U.S.C. § 156 must also include that right. * * * On the basis of our rejection of the CNW's assertion that any implied term must include the absolute power to amend Rule G unilaterally, we affirm the district court in this regard.

The court, therefore, held that a new rule disciplining employees for off-duty use or possession of narcotics constituted a formal change of the collective bargaining agreement and, therefore, was a major dispute under the RLA.

Contrary to the implications SEPTA attempts to create, its program goes further than seeing to it that all employees are fit for duty. It fully regulates their off-duty conduct, because anyone subject to duty or call to duty may be required to take and pass the random test. Further, the tests look to metabolites which register a prior history of use, not necessarily current use or impairment at that point of time for duty. Moreover, it is difficult to perceive that random testing is less obtrusive than medical examination testing as claimed by SEPTA at page 17 of the petition. Here, "[t]he final random testing proposal approved by the distrct court subjects 2,600 workers to random urinalysis testing over a one-year period, and approximately 5,400 workers per year to random breathalyzer testing." Pet. App. A9. About 10 percent of the employees will be tested twice, and two percent more frequently, leading the district court to say, "Using this statistical design, each operating employee will be at testing risk every day, although the chances of being

tested more than twice a year will be small." Pet. App. A42.

Moreover, as the leading authorities establish, each case must be evaluated on its own facts as to whether there has been any "meeting of the minds" by the parties so that the prior history establishes a contractual right. Thus, SEPTA's reference to the Seventh Circuit's comment on the lack of union objection to medical examinations in the *Norfolk & Western* case makes much ado about little. For example, in *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *pet. for cert. filed*, 57 U.S.L.W. 3017 (U.S. April 1, 1988), the Ninth Circuit, in holding a mandatory urine testing program to be a major dispute, said in reply to a similar contention:

> BN's new mandatory urine testing program is a clear change in working conditions governed by the collective agreement and, thus, by definition a major dispute. It is a mistake to conclude that BLE impliedly agreed to the new testing program just because "through custom and practice" it had for forty years accepted enforcement of Rule G by the non-intrusive procedure of sensory surveillance.

Id., at 1093. Likewise, the Fifth Circuit has held that the implementation of a mandatory drug testing program constitutes a major dispute, for the proposed program was not "arguably justified by the contract as embodied in the express terms of the collective bargaining agreement, and as amplified by actual objective working conditions and practices." *International Brotherhood of Teamsters v. Southwest Airlines, Inc.*, 842 F.2d 794, 804 (5th Cir. 1988), *reh'g en banc granted*, 853 F.2d 283 (1988).

Accordingly, it becomes obvious, as the Eighth Circuit said in *Missouri Pacific Joint Protective Board v. Missouri Pacific R.R.*, 730 F.2d 533, at 536-37 (8th Cir. 1984):

> . . . [W]hether a dispute is minor or major is often a question of degree, *Itasca Lodge 2029 v. Ry. Express Agency, Inc.*, 391 F.2d 657, 665 (8th Cir. 1968) (quoting *Rutland R.R. Corp. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 33 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963), and turns upon the facts in each case. *See United Transporation Union, Lodge 612 v. Illinois Terminal R.R. Co.*, 471 F.2d 375, 379 (7th Cir. 1972); *Rutland*, 307 F.2d at 36. Whether a dispute is minor or major involves first a determination of factual issues, *see Airline Pilots Ass'n v. Northwest Airlines, Inc.*, 570 F.2d 257, 258 (8th Cir. 1978), and then conclusions of law based on those findings.

When this record is appropriately reviewed, common sense dictates that one must conclude that the decision of the court of appeals is consistent in reasoning with prior RLA decisions and does not conflict with any applicable holding in any other circuit.

III.

THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION THAT NEEDS TO BE ADDRESSED BY THE COURT

Respondents submit that this case involves only a very narrow RLA issue – one which has been authoritatively determined by this Court or will be as a result of the ruling in the Conrail case now before the Court, was decided under a uniform standard followed by the various courts of appeals, and has been ruled upon in an adequate and consistent manner by various courts. Nevertheless, SEPTA is requesting the Court to address an

issue that is more properly one to be determined, if at all, by legislation — legislation, which regardless of its merit, could remove drug and alcohol testing programs from the collective bargaining table and give employers the exclusive authority to promulgate the type of massive testing programs sought by SEPTA.

However, SEPTA seeks to convert a relatively simple labor relations issue into a unique and unusual situation, which this is not. Railway employers and their employees have always been confronted with tough bargaining decisions and have resolved those disputes. SEPTA's claim that drug testing programs should not be subjected to collective bargaining because the employees must be deterred from using alcohol and drugs and the court of appeals erred, therefore, is simply wrong. The appellate court clearly did not decide that employees can use drugs and alcohol without suffering the consequences of their indiscretions. Moreover, SEPTA's contention is contrary to the view expressed by its own expert and other well held expert opinion that effective drug and alcohol programs must be cooperative labor-management programs and fashioned through collective bargaining. Manello, *Prevalence, Costs and Handling of Drinking Problems on Seven Railroads*, Federal Railroad Administration, Technical Report, Contract No. DOT-TSC-1375 (1979). *See also* testimony of Dr. Robert J. Pandina, Resp. App. at 4a.

Further, SEPTA's assertions are contrary to the prevailing view that drug testing affects employment relationships and is a working condition. That argument flies

in the face of the well held principle that drug testing is an appropriate subject of collective bargaining.[3]

As we previously noted, during the pendency of this case, major railroads have negotiated comprehensive, cooperative testing and enforcement programs with the respondent unions. During that period, SEPTA could have bargained with respondents on a complete drug and alcohol program. Rather, it refused. The reason there is a somewhat complete program today is not due to SEPTA, which has been forced to it by the fight by respondents for some accommodation of the personal and constitutional concerns of their members. That the picture painted by SEPTA is, in fact, not a true facsimile of the real life situation can be seen from its successful negotiation of testing programs in recent days with the Brotherhood of Railroad Signalmen, Local 234 of the Transport Workers' Union of Philadelphia, and Local 1594 of the United Transportation Union (trolley division covered by

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[3] In NLRB General Counsel Memorandum 87-5 (Sept. 8, 1987), 4 CCH Labor Law Rep. ¶9344, the General Counsel for the National Labor Relations Board opined that: (1) drug testing for employees and job applicants is a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d); (2) implementation of a drug testing program is a substantial change in working conditions even where physical examinations previously had been given and even if established work rules precluded the use or possession of drugs in the plant; and (3) the established Board policy that a union's waiver of its bargaining rights must be clear and unmistakable will be applied to drug testing. SEPTA's argument that it has, or should have, an absolute right to change conditions of employment with respect to drug use is diametrically opposed to the position of the NLRB's General Counsel.

state labor relations law). If SEPTA had bargained in good faith with the railway unions on comprehensive, cooperative programs, which include testing in a medical mode, its concerns, the public's concerns, and the concerns of the unions and their members might have been accommodated long before now. And we submit that collective bargaining will work with the respondent rail unions once these legal manuevers by SEPTA are terminated.

In this connection, we observe that until Congress sees fit to remove particular subjects from the collective bargaining table, the public interest will best be served by requiring adherence to the mandatory requirements of the RLA. Collective bargaining will also insure that each employee's constitutional rights in an equitable and humane testing and enforcement program will be adequately protected. Moreover, with those procedures being collectively bargained with safeguards in a collaborative program, litigation and controversies will be negated and fairly limited, thereby reducing strains upon the forums dealing with such problems, effectively eliminating tensions in the labor-management relationship, and enhancing morale in the work place.

Simply put, this case does not involve any situation demanding the exercise of this Court's guidance, as asserted in the petition. It is a typical labor controversy — difficult to resolve perhaps, but one that can be and has been satisfactorily resolved throughout the modern history of the RLA. Thus, the determinations below, which we believe were correct, do not warrant this Court's attention.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

Excerpts of Testimony of Robert J. Pandina from Transcript in *Transport Workers Union, Local 234, et al. v. Southeastern Pennsylvania Transportation Authority* Civil Action No. 87-0389, etc., United States District Court for the Eastern District of Pennsylvania (678 F. Supp. 543 (E.D.Pa. 1988).

(February 5, 1987)

(p. 267) ROBERT J. PANDINA, having been duly sworn, was examined and testified as follows:

(Direct Examination)

(p. 283) Q. What other elements would you think are essential to provide an effective or successful program?

A. I preface my remarks by saying this is an area in which a tremendous amount of clinical and what we would call experimental, or quasi-experimental work is being done at the present time. It is far from an exact science, if you will.

However, we have learned some lessons from our experience to date. For example, it is my opinion, based on my experience and from the examples in which I have been involved, that any effective program must have a number of elements with the treatment rehabilitation component being only one of those legs of the stool upon which such a program can rest.

Another element is clearly an education and training program. And here, by that I mean a broad-based program. Not simply for supervisors or for management, but

would also include employees to help to motivate employees to understand the problems involved in any drug usage and the ways in which such drug usage could compromise their competency not only on the job but in their own personal functioning.

In a sense, here we are talking about a kind of motivational component and an information component. We are trying to inform people what the problems related to drug use are. And to motivate them to be abstinent; that is, drug free.

A second component part of that training program is (p. 284) also to help train them with regard to the rules, whatever those rules are, with regard to company management policies so that they understand how to use such systems as rehabilitation systems. After all, a rehabilitation system cannot be very effective if you cannot obtain bodies to put in the system, and it is important to find a way to motivate employees to the system and teach them how to use it.

You must also train others in a position of authority, such as management personnel, supervisors, you must train them in the same way that you train all employees with regard to problems related to alcohol and drug use and abuse, and as well as to train them to the way the system operates in that particular culture.

You then, in addition to education and training programs, must also have a rehabilitation component; that is, a treatment component, including a screening component which would allow you to deal with employees who have such problems.

A third and important element is a set of rules and penalties, sanctions, with regard to use of various kinds of substances in the environment, and there needs to be, in essence, sanctions against the use of such drugs, or use of such drugs in a manner in which they will interfere with or can potentially interefer (sic) with the performance of the individual. This is, in a sense, an external incentive.

I make a distinction between a motivation where we (p. 285) are attempting to provide information to the individual to motivate them toward a particular behavior, and an incentive in the environment.

One of the other incentives in the environment, I consider this to be critical, is the ability of the system to deal with individuals who voluntarily come forward to be treated and not to impose severe sanctions against people who voluntarily come forward.

I would also be concerned that those individuals receive whatever compensation during that period of disability that they might receive, as they might receive for any other disability. In other words, it has to be within the culture, the climate of the organization.

I would expect the organization, for example, if it paid for sick benefits for pneumonia, or a mental disfunction, also to pay for any drug abuse treatment, up to some reasonable limits, and that is negotiated between the management and the union.

Those are the basic elements in any what I would consider to be a good program. Without any of those, you've got some real problems.

* * *

(February 6, 1987)

(Cross-Examination)

(p. 492) Q. I gather from your testimony in chief that you do believe that one of the major ingredients in having a good drug and alcohol program with any employer is a cooperative program between labor and management.

A. Absolutely.

Q. And would you say that there should be negotiated programs between those parties?

MR. MEYER: I object, your Honor. That really goes to one of the matters that you have to decide in this case.

THE COURT: Overruled.

You may answer.

A. Could you restate the question, or could we have it read back?

(p. 493) (The court reporter read back the pending question.)

A. Under the best of circumstances, that would be most desirable.

Q. And, would you say in your judgment that the negotiations should include a cooperative labor management rehabilitation phase in that program?

A. I don't think I understand your terminology, sir.

Q. Or should the two parties, labor and management, sit down and also draw up the requisites, and et cetera, of a rehabilitation program?

A. In theory I would say that that is an important element. Of course you also have to take into account, as you probably well know, the history of the way labor and management have operated in the past in such types of agreements.

* * *

(September 21, 1987)

(Recross Examination)

(p. 97) Q. I believe you testified last time that represent – involvement by a labor union, representing employees, is important in an EAP, if the EAP is going to work; is that correct?

(p. 98) A. I said that's an important element, yes, it's a desirable element, yes.

Q. What role would that the union have in that circumstance?

A. I would see the chief role of that union would be to encourage its membership to participate in the employee assistance program. I would also see it joining it as a partner in that EAP program, particularly in the area, as I've mentioned, to encourage individuals to participate. I would hope that they would have the opportunity to make comment on the program that was suggested by management.

* * *